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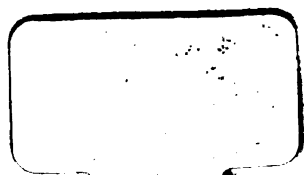
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GENERAL ABRIDGMENT

OF

Law and Equity,

ALPHABETICALLY DIGESTED UNDER
PROPER TITLES;

WITH NOTES AND REFERENCES
TO THE WHOLE.

BY CHARLES VINER, Esq.

FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY
OF OXFORD.

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(O) Conufance of Pleas.

Remover.

What will be a *ſufficient Cauſe* to remove,

[1. **T**HE *returns of iſſues* againſt a party of 2 d. or no *iſſues*, by the bailiff of a franchise, where he might have returned iſſues to 20 l. is no cauſe to remove the plea, for the other party might aver in the franchise, that more iſſues might have been returned. 45 Ed. 3. 7.]

Fitzh. Cauſe de Remover &c. pl. 9. cites S. C.

[2. But if the under-bailiff returns too ſmall iſſues by covin and procurement of the bailiff, who is judge, this is a good cauſe to remove the plea. 45 Ed. 3. 7.]

Br. Cauſe de Remover &c. pl. 9. cites S. C.

— Fitzh. Cauſe de Remover &c. pl. 9. cites S. C.

[3. In an aſſiſe, if the bailiff of the franchise does not ſue the record of the day that the plaintiff hath in the franchise, this is not any cauſe to remove the plea, for the record is at all times to be ſued by the plaintiff or demandant. 27 Aff. 72. by all the juſtices.]

Br. Conuſance, pl. 41. cites S. C.

— Fitzh. Conuſans, pl. 58. cites S. C.

[4. It is a good cauſe to remove a plea, that the bailiff, who is the judge, is of the robes of the plaintiff. 12 H. 4. 13.]

Br. Cauſe de Remover &c. pl. 13. cites S. C.

and 11 H. 4. 11 per Hank.—In aſſiſe of freſh-force the tenant by recordare removed the plea out of the court of ancient demefne becauſe the bailiff was of the robes of the plaintiff, and favours him, and it was remanded; for the ſuitors are judges, and not the bailiff, and the lord ſhall not be prejudiced. Br. Cauſe a Remover, pl. 14. cites 12 H. 4. 17.—But where it is removed out of the county into Bank becauſe the ſheriff is of the robes of the plaintiff, and favours him, this ſhall not be remanded; for the one Court and the other is the King's Court; Note the diverſity. Ibid.

[5. If conuſance be granted to be held before the mayor and bailiffs, if one of one bailiffs bring an action within the franchise, it is no cauſe to remove the plea, quia favet, becauſe he himſelf is judge; for if the defendant takes this exception, there the plaintiff ought to ſtay his action till he be out of his office, otherwiſe it is error. 2 H. 4. 4. b.]

Br. Cauſe de Remover &c. pl. 114. cites S. C.

— Fitzh. Cauſe de Remover, pl. 6. cites S. C. —

Br. parol &c. remanded, pl. 2. cites S. C. that the parol was remanded ex aſſenſu omnium juſticiariorum de C. B.—Writ of right-cloſe was ſued in ancient demefne in O. and the tenants, Vol. VI.

B

pending

pending the writ, *sued recordare to the sheriff* of the county to remove the parol, and *alleged cause* in the writ, *Et quod J. N. sub-ballivus curiæ illius est consanguineus petentis & favet petentem*; and per tot. cur. this is no sufficient cause*; for he is not judge, for the *suitors are judges*, and if he makes an ill pannel, the party may challenge; and per cur. it is not any sufficient cause to remove the parol, but *quia clamat tenere ad communem legem generally, or per finem in curiæ regis levatum*, or other such matter of record; for the right of land in ancient demesne shall not be tried here in Bank, but the said two causes may be determined here, and if the causes are found false, to remand the parol, and if not, then all shall abate, and the party shall sue at common law, and so see that they *shall not proceed upon this original which comes out of the base court*; quod nota, per cur. and if *essojn be cast for the tenants at the day &c. it shall be quashed, be the cause sufficient or not*; for if it be not sufficient, the parol shall be remanded, and if it be sufficient, the parties shall sue at the common law by writ, and not upon this plaint which is so removed; quod nota, per judicium ibidem. Br. Cause a Remover, pl. 7. cites 35 H. 6. 35.

* S. P. Br. Cause a Remover, pl. 12. cites 3 H. 4. 14.—S. P. ibid. pl. 30. cites 11 H. 6. 10. unless the bailiff was judge.

[2]

Br. Conufance pl. 27. cites 8 H. 6. 18. S. C. per Cotton.

[6. If conufance be granted to be held before the bailiff, if an *action* be brought *against the bailiff*, this is good cause to remove the plea, because he cannot be his own judge. 8 H. 6. 19. 6.]

[And * Roll seems to be misprinted (9) for (6).—The holding the plea before himself is no cause to remove the plea; for the plea may have writ of error if &c. Br. Cause de Remover &c. pl. 39. cites 35 H. 6. 54.]

* Br. Resummons pl. 9. cites S. C.—

[7. *Failure of right* in a franchise is good cause to remove. * 11 H. 4. 27 b. † 8 H. 6. 20.]

Br. Conufans, pl. 16. cites S. C.—Br. Voucher, pl. 161. cites S. C.—Fitzh. Resummons, pl. 12. cites 11 H. 4. 21. S. P. [but it seems it should be 11 H. 4. 27 b. pl. 52.]

† Br. Conufans, pl. 27. cites S. C.

In assise the bailiff of the franchise demanded conufance of the plea, and had it, and after *re-attachment* was sued because the *bailiff had failed of right*, and was pone per vad. *ita quod loquela illa sit, &c. in eodem statu &c.* and that *ballivi ibi de recto deficiant*, and quod *habeat corpora jur. &c.* Br. Conufance, pl. 42. cites 26 Aff. 67.

* Br. Resummons, pl. 9. cites S. C.—

[8. (*As*) If a *foreigner* be *vouched* in a franchise, this is a good cause to remove it for failure there. * 11 H. 4. 27. b. 8 H. 6. 20.]

Br. Conufans, pl. 16. cites S. C.—Br. Voucher, pl. 161. cites S. C.—Fitzh. Resummons, pl. 12. cites 11 H. 4. 21. [but it seems misprinted, and that it should be 11 H. 7. 27. b. pl. 52.]

[9. So if a *plea* be pleaded that *bears date out of the jurisdiction*. 8 H. 6. 20.]

[10. If conufance be *to be held before the bailiff of an abbot* (as it seems to be intended), and a *real action* is brought *against the abbot*, and the *abbot saith, that he hath the land of the gift of the king, and prays aid of the king*, this shall not be any cause to remove the plea, for he hath not failed of right there; for he may have aid of the king, and the king may send to the justices to proceed to judgment, as well as in Banco. 21 Ed. 3. 38. b. adjudged.]

Br. Conufans, pl. 27. cites S. C.

[11. If they will *err voluntarily in a thing of which a writ of error lies, and this can be reformed by it*, this shall not be cause to remove the plea. Contra 8 H. 6. 20.]

[12. *As if they will not grant the view where the view lies,* this is no cauſe. 8 H. 6. 20.] Br. Conuſans, pl. 27. cites S. C.

[13. *But if they err voluntarily in ſuch a thing, of which a writ of error lies not, nor can be reformed by it,* this ſhall be good cauſe to remove it. 8 H. 6. 20.] Br. Conuſans, pl. 27. cites S. C.

[14. *As if they will not record a default as they ought, or will not give judgment,* this is good cauſe to remove it, becauſe no writ of error lies without judgment, nor the error of the default will not appear of record to be reformed. 8 H. b. 20.] Br. Conuſans, pl. 27. cites S. C.

[15. *If wrong be done to a tenant or defendant that goes but in delay, as it ſeems to be intended,* this is no cauſe of removal, for *he is not at prejudice*, becauſe he hath the poſſeſſion of the land. 8 H. 6. 20.] Br. Conuſans, pl. 27. cites S. C.

[16. *If conuſance be granted, and the bailiff will not read the writ there,* it is good cauſe of reſummons. 18 E. 3. 31. b.] * Fol. 497.

[17. *In an action, if the franchiſe hath conuſance granted, and in the franchiſe the defendant pleads villeinage in the plain-tiff,* this is good cauſe of a reſummons, becauſe this cannot be tried there. 26 Ed. 3. 73. b.] Fitzh. Co-nuſans, pl. 86. cites S. C.

18. *If the land be frank ſee,* and the tenant is impleaded in ancient demefne, it is a good cauſe to remove the parol to the common law, becauſe he *claims to hold at common law*, and he *ſhall ſhew his cauſe at the day in Bank.* Br. Cauſe a Remover, [3] pl. 17. cites 21 E. 3. 32.

19. *Demife of the lord of ancient demefne for term of life by livery without deed,* is ſufficient cauſe to remove the plea out of ancient demefne to the common law by recordare. Br. Cauſe a Remover, pl. 10. cites 50 Ed. 3. 24.

20. *So of a fine or charter of the lord, or deed of the lord, to hold at common law.* Ibid.

21. The parol removed out of court baron, becauſe *there were only four ſuitors*; therefore quære what number ſuffices when there are no more. Br. Cauſe a Remover, pl. 35. cites Register fol. 11.

22. Where a man *recovers damages in aſſiſe* of freſh-force, and the defendant is not ſufficient in the franchiſe, this may be removed and executed in another court. Br. Cauſe a Remover, pl. 54. Br. Recog-niſans, pl. 15. cites F. N. B. 243. (B)

23. Where he that claims conuſance, ſhall not hold plea of matters wherein *himſelf is party*, See Tit. Judges (A) per totum.

(P) Pleading after Removal.

[1. *If a plea be removed out of the lords court for cauſe,* the cauſe is traverſable. 12 H. 4. 13. b.] Br. Cauſe de Remover &c. pl. 13.

cites S. C. — Fitz. Cauſe de Remover &c. pl. 7. cites S. C. — *After reſummons out of the franchiſe for failure of the right, the bailiff came and traverſed the cauſe and his challenge was entered upon the eſſoign which was caſt by the tenant upon the reſummons.* Br. Conuſans, pl. 66. cites 39. E. 3. 17.

2. In *præcipe quod reddat*, conusance of plea was prayed and granted to the franchise, and after the tenant sued *resummons*, because the court failed him of right, and the demandant was *essoined*, and the bailiff came and said, that he would *traverse* the cause, and prayed that (*&c. super hoc venit, &c.*) be entered upon the *essoin*, and so it was, *Dies datus ultra*. Br. Cause a Remover, pl. 20. cites 39 E. 3. 17.

Br. Double
Plea, pl.
119. cites
S. C. Br.
Issues
joined, pl.
4. cites S. C.

3. In *resummons*, the bailiffs of N. demanded conusance, and the demandants said, that at another time they demanded conusance and had it, and at the day failed of right, because they suffered the tenant to be *essoined* where he had attorney, and the tenant demanded the view, and they would not make him a precept to view, and also where there were two bailiffs, who ought to sit, the one came and the other not, and all the points were suffered in issue, and because in a manner the king is party, and therefore may affirm the jurisdiction of the court the issue was suffered upon all, and this upon *resummons* in new original, as it seems, and there the tenant was not compelled to join with the one or the other; contra 34 H. 6. And in this case it was alledged, that the demandant was *non-suited* in the franchise, and yet the issue was taken ut *supra*. Br. Conusance, pl. 10. cites 40 E. 3. 11.

4. If conusance of plea be granted to the bailiff of a franchise, and he fails of right, it is a good cause to remove the plea, and upon the *resummons* this cause shall be shewn, and the bailiffs may *traverse* the cause, quod nota; viz. they may demand conusance again, and there the cause shall be shewn, and the bailiffs may *traverse* it. Br. Cause a Remover, pl. 8. cites 34 H. 6. 48.

5. Note, that where conusance of plea was granted, and *resummons* sued for failure of right, the bailiffs may demand conusance again, and then the demandant shall shew how they failed, &c. the bailiffs shall *traverse* the cause, and upon this, [4] by the best opinion, the tenant ought to join in this issue with the demandant or with the bailiffs, and if he joins with them, and it is found with the demandant it is *peremptory* to the tenant; contra if he joins to the demandant, for there the demandant cannot have judgment against him where the issue is found with himself against a stranger, and not against the tenant. Br. Conusance, pl. 5. cites 34 H. 6. 53.

(Q) Conusance. Resummons.

In what Cases it lies.

[1. AFTER conusance is granted, if there be good cause after to remove the plea, a *resummons* shall be sued in the court where the original was commenced. 8 H. 6. 20. 18 E. 3. 3. b. 1. Ed. 3. 21. b.]

[2. Br.]

[2. But when it comes there, if no cause appears, it shall be *resman. ed.* 1 Ed. 3. 21. b.]

3. In *formedon* the bailiffs of S. have conusance of the plea, and the *tenant vouched a foreigner* in the franchise, the demandant shall have resummons; for this *want of power is failure of right*, and the bailiffs shall never have the conusance again, *quod nota inde bene.* Br. Conusance, pl. 16. cites 11 H. 4. 27.

Br. Resummons, pl. 9. cites S. C.

4. Where a *bailiff has conusance, and be himself is party*, it is a good cause to sue resummons; per Cotton. Br. Conusance, pl. 27, cites 8 H. 6. 18.

(R) Conusance.

Remover.

Resummons.

[What shall be Removed on the Resummons.]

[1. WHEN conusance is granted to a franchise out of C. B. and there is a *foreign voucher*, and thereupon the demandant sues a resummons in Banco for failure of right there, nothing shall come of the record in Banco but the original, and the party shall be at large to plead any plea. 11 H. 4. 87. b.]

S. P. and per Hank. if he vouches in franchise, and after the parol is resummoned into Bank, there the

denant may vouch another. Br. Resummons, pl. 21. cites S. C. — Br. Conusance, pl. 19. cites S. C. and it is said there, that though resummons be sued out of franchise in Bank after conusance granted, yet nothing done in the franchise shall be of record in C. B. but only the original.

2. In assise of mortdancester in Chester, the tenant *vouched foreigner*, and record sent into Bank, and there the tenant made default, and therefore the record remanded to take the assise. Br. Cause a Remover, pl. 21. cites 8. Aff. 22.

3. Where the *action is brought in Bank, and L. has conusance of the plea*, and failed the party of right in their franchise by *foreign voucher*, foreign plea, &c. Resummons lies to reduce it in Bank; for there it never shall be remanded into the franchise; per Hill and Hank. For conusance is granted upon condition, *quod celeris fiat iustitia, alioquin redeat.* Br. Certiorari, pl. 16. cites 11 H. 4.

[5]

4. If record be removed out of the county or franchise into Bank, nothing shall be of record in Bank but the original. Br. Cause a Remover, pl. 47. cites 2 H. 7. 5.

5. But where record is sent into a franchise by conusance of plea granted to them, there all the record of the Bank shall be of the record of the franchise. Ibid.

For more of Conusance of Pleas in general, see *Fines (C)*, *Judge (A)*, *Prohibition*, *Resummons*, *University*, and other proper titles.

Copyhold.

(A) Its Original, and how considered, and of what it consists. And the several Sorts.

1. **C**OPYHOLD tenants *were tenants in villeinage*. Br. Tenant per Copy, pl. 25. cites F. N. B. fol. 12.

(C) 2. Such customary inheritances shall not have by the law any other collateral qualities but such as concern the descent of the inheritance which other inheritances at common law have; for as without custom such estate at will cannot be descendible, so neither can it have any collateral quality or incident to other inheritances at common law; for copyholders have estates of inheritances *secundum quid*, viz. to be descendible by custom to their heirs, and not to be determined by the deaths, nor subject to the will of the lord as other estates at will are, but are *not* estates of inheritance *simpliciter*, viz. to all other collateral qualities, but such as custom has allowed, or are incident to them. 4 Rep. 22. a. Mich. 23 & 24 Eliz. C. B. the 2d Resolution in Brown's Case.

3. Though a copyholder has not in judgment of the law but only an estate at will, yet custom has so established and fixed his estate, that by the custom of the manor it is descendible, and his heirs shall inherit it, and so *his estate is not merely ad voluntatem domini, but ad voluntatem domini secundum consuetudinem manerii*; resolved per tot. cur. 4 Rep. 21. a. Mich. 23 & 24 Eliz. C. B. in Browne's Case.

Gilb. Treat. of Ten. 145. cites S. C. and says, the reason of this seems to be, because upon copyhold estates villein tenures were usually reserved, and those estates were given to villains; therefore no other estates could be granted to them, but at will; for otherwise they had been franchised, as it seems; but to prevent the frequent ending of these estates they granted them in fee, but yet at the will of the lord, and according to my Lord Coke, notwithstanding such grant, they were entirely at the will of the lord, who ousted them when he pleased, without any reason, which being a very great inconvenience, it seems it was altered by some positive law (though that does not appear) which preserved their estates to them, doing their services, but yet left them as it found them, to have estates only at will. — a New Abr. 457. in totidem verbis, without citing it out of Ld. Ch. B. Gilbert.

[6]

So if an erroneous judgment be given against a copyholder, he cannot have a writ of

4. Though some tenants by copy of court roll have an estate of inheritance, yet they have nothing but at the will of the lord according to the course of the common law, for if the lord ousts them they have no other remedy but to sue the lord by petition.* 3 Rep. 8. a. Pasch. 26 Eliz. in Scacc. Heydon's Case.

False judgment, but must sue to the lord by petition to reverse the judgment; per cur. 4 Rep. 21. b. Mich. 24 & 25 Eliz. C. B. cites 13 R. 2. Tit. False Judgment, 7.

5. A copyhold consists of six principal grounds or circumstances. 1st, There must be a *manor* for the maintenance of a copyhold. 2dly, A *custom* for the allowing of the same. 3dly, There must be a *court holden* for the proof of the copyholders. 4thly, A *lord* to give the copyhold. 5thly, A *tenant* of capacity to take the tenement, 6thly, The *thing to be granted* which must be such as is grantable, and may be held of the lord according to the tenure. Calth. Reading. 2. 3.

6. It appears by a certain book intituled, *De Præis Anglorum Legibus*, translated out of the Saxon tongue by Master Lambert of Lincoln's-inn, that copyholds were long before the conquest, and then called by the name of *book-land* as you may see in the beginning of the book, in the treatise *De Rerum & Verborum explicatione*; and by Master Bracton, an ancient writer of the laws of England, who in his book writeth divers precedents and records of H. 3. of allowance that copyholders of customary tenants doing their due services, the lord might not expel them according to the opinion of latter judges in the time of E. 3. & E. 4. And it appears by Master Fitzherbert's Abridgment, they were preserved by a special writ for that purpose, and the lord thereby compelled to do right. And in the time of H. 4. tenants by the virge, which are the same in nature as copyholders be, were allowed by the name of *Jokemaines* in franktenure, and in the time of H. 7. were allowed aid of the king for defence of their estates, Calth. Reading, 3, 4.

7. There is no copyhold land but at first was *demesne land*; per Ley Ch. J. 2 Roll Rep. 236. Mich. 20 Jac. B. R.

8. There are three manner of copyhold lands besides the two sorts of *old after* and *new after*; after signifies an host, chimney, or a stew. Now those copyhold lands which had long time usually a house on them, they were called *old after* lands, but those which but of late had houses built on them were called *new asters*, from the house newly erected on them; and in old records the bastard eigne did plead, that he was *filius askarius*, as much as to say, born in the house, or in the same family; and so are the ancient records which he had seen, and so Britton calleth him; besides these, he said, there are three kinds of copyholds which he had known in his practice. 1. *Terra nativa*, and this was also called *bond-lands*, because held by villains. 2. *Customary*, and this was held by free tenants. 3. *Mensalis*, and called also *dominica*, besides by this the lord's table is maintained; per Ley Ch. J. And per Richardson, some copyhold land is called *poad-land* and some *molland*, a *molli redditu*, from the little rent reserved. 2 Roll Rep. 236, Mich. 20 Jac. B. R. in Case of Smith v. Reynard.

9. Copyhold is nothing but a *tenancy at will* in the eye of the law. 3 Lev. 94. Mich. 34 Car. 2. C. B.

10. Copyhold lands are *not holden of the manor, but are parcel of the manor itself*, which consists of demesnes and services; arg. and of this opinion were Treby Ch. J. and Nevil, and Rooksby Justices, but Powell J. contra; for one says in common speech, that copyhold lands are held of the manor. Ld. Raym. Rep. 44. Pasch. 7 W. 3. C. B. in Case of Brittle v. Bade.

[7] 11. Copyholds, though now supported by custom, *were at first established by act of parliament*, as all other parts of the common law were till the records of them came to be lost; per Lord Macclesfield. Chan. Prec. 574. Trin. 1721. in Case of Sir H. Peachy v. D. of Somerset.

(B) What is, or may pass, as Copyhold; and by what Words.

1. **A**S to the custom that certain tenants within the same manor, have used to have lands, &c. to them and their heirs in fee-simple, and fee-tail, or for life at the will of the lord, there must be *three supporters*, the 1st. is *time*, and that must be out of memory of man, which is included in the word custom, so as copyhold cannot begin at this day. The 2d is, *that the tenements be parcel of the manor, or within the manor*. The 3d, *that it has been demised and demisable by copy of court roll*, for it need not be demised time out of mind by copy of court, but if it be demisable it is sufficient. Co. Litt. 58. 6.

2. And 1st. a *manor may be granted by Copy*. 2dly, *Underwoods* without the soil, so the *herbage or pasture* of land. 3dly, Generally all lands and tenements within the manor, and *whatsoever concerneth lands or tenements, as a fair appendant* to a manor may be granted by copy, &c. Co. Litt. 58. b.

* S. P. by Chamberlain, that in the King's case it will not pass the copyhold land with the other demesnes; but Hitcham said, that in the case of a common person, it will not pass the copyhold land if he has other demesnes to supply the

3. The opinion of Bracton and Fleta, both consenting in one, that copyhold lands is *parcel of the lords demesne*, wants not modern authority to second it; for 15 Eliz. in the Exchequer, Coke says he finds it adjudged *in the case of a common person, howsoever it is otherwise in the King's case*, that if the lord of the manor grants away omnes terras suas dominicales, the copyholds parcel of the manor, pass by these general words. Neither doth this want reason to confirm it; for *in the time H. 3. and E. 2.* when Bracton and Fleta lived, *copyholders were accounted mere tenants at will*, and therefore after a fort their lands were reputed to continue still in their lords hands; and now though custom hath afforded them a surer foundation to build upon, yet the franktenement of the common law resting in the lord, it can be no strange thing to place the lands under the rank of the lords demesnes. But Lord Coke says, to deliver his mind more freely in this points

point, he thinks that howsoever, according to the strict rules of law, these copyholds are parcel of the lords demesnes, yet in propriety of speech (if propriety can be in impropriety) they are the *more aptly called the copyholders demesnes*; for though the franktenement be in the lord by the common law, yet by the custom the inheritance abideth in the copyholders; and it is not denied, if a copyholder be impleaded in making title to his copyhold, he may justly plead, *quod est seiscitus in dominico suo*, with this addition, *secundum consuetud. manerii*. Therefore Lord Coke says, he concludes, that howsoever the common law valueth the title of the copyholder, yet he has such an interest confirmed unto him by custom, that the lord having no power to resume his lands at pleasure, they are (though improperly) called (yet perhaps truly accounted) the lords demesnes, and that in the eye of the world, howsoever it be in the eye of the law, that those lands alone can properly challenge the name of the lords demesnes (if any lands in the possession of inferior lords may properly challenge that name) which the lord reserveth in his own lands, for maintenance of his own board or table, be it his waste ground, his arable ground, his pasture ground, or his meadow; be it his copyhold which he hath by escheat, by forfeiture, or by purchase; or be it any part of his freehold, of which my Lord Coke says, he must speak a word by the way not to prove that it is demesne, for manifesta probatione non indigent, but to shew you in what sense it is taken, and how far it extends, Co. Comp. Cop. 32. S. 14.

words of the grant. 2 Roll Rep. 236. Mich. 20 Jac. B. R. in case of Smith v. Reynard.

— It is said in Lex. Cust. 92. to be adjudged, that if a man grants all his demesne lands, his copyhold lands will not pass, if he has other lands to

[8] satisfy the words of his grant. It seems this must be understood of those lands that he holds by copy, or else it thwarts the case before; and the reason is, be-

cause copyhold lands do not pass by such conveyance, but by surrender. If copyhold land escheat, and are in the King's hands, and he grants omnes terras suas dominicales, quære if they shall pass. It seems every thing demisable by copy must be parcel of the manor; for the custom can only extend to the manor, and the pleading is quod infra manerium, &c. Gilb. Ten. of Ten. 295.

4. A custom to make a copyhold must be of necessity in the same manor where the said copyholds are so granted, viz. that the same are, and have been time out of mind only demised, and demisable by copy of court roll; for otherwise the lord cannot grant it by copy, because he cannot begin a custom at this day. But if it have been by like time granted by copy, though since it came to the lords hands, yet if the lord never demises the same by free deed or otherwise, but by copy, then he may well grant again the same by copy, for it is neither the person of the lord nor the occupation of the land, that either makes or destroys the copyhold, but only the usage and manner of demising the same; for the prescription of a copyholder consists neither in the land nor in the occupier, but only in the usage. Calth. Reading, 16.

5. If lands have been demised by copy by the space of 60 years, and yet there be some alive that remember the same occupied by indenture, this is not a good copyhold. Calth. Reading, 19.

6. And if lands have been demised by copy but forty years,

years, and there is none alive that can remember the same so by *otherwise demised*, this is a good copyhold, for the number of years makes not the matter, but the memory of man. And it is not 60, 80, or 100 years, that makes a copyhold or a custom, though it makes a limitation. But such certain number of years makes only a likelihood, or presumption of a prescription; that is, that it commonly happens not that any man's memory alive can remember alone such a number of years, but if any chance to be alive that remembers the contrary, then such prescription must give place to such Proof. Calth. Reading, 19.

7. Lord of a manor seised of land which was ancient copyhold, leases it for 500 years, and 3 years after grants it by copy to another, who was admitted for lives, and paid his fine. S. purchases the manor, and got the lease assigned in trust for him (though he knew how the matter was at his time of purchase) and the copyholder had several years enjoyed the land quietly as copyhold. Decreed that the tenant by copy shall hold according to his grant. N. Ch. R. 26. 10 Car. 1. *Hutchings v. Strode*.

So land which had been enjoyed 60 years as copyhold was allowed.

Toth. 160.

cites 21 El. *Wrayford v. Carw.*—So for 50 years was allowed

[9] till recovered at law. Toth. 106. cites

Trin. 27 Eliz. Bapfool. v. Roberts.—Toth. 107. cites 22 and 23 Eliz. 1 *Freeman v. Pennv.*

So where lands had gone 5 years as copyhold of inheritance it was allowed. Toth. 106. 107.

3 Salk. 100. pl. 2. S. C. in totidem Verbis.

9. Whatever may pass by deed without surrender (though it be required that the deed be inrolled in the lords court) can be no copyhold, and whatever may pass by surrender in the lords court, *secundum consuetudinem manerii*, (but *non secundum voluntatem domini*) is no copyhold; per Cur. Cumb. 387. Mich. 8 W. 3. B. R. *Smith v. Page*.

2 Vent. 143. S. P. in case of *Rogers v. Bradley*.

10. Lands time out of mind passed by surrender, and copy of court roll and the grant was always *tenena. secundum consuetud. manerii*, but never had the words *ad voluntatem domini*. Resolved that they are not copyhold but a *customary freehold*, Carth. 432. Mich. 9 W. 3. B. R. *Gale v. Noble*.

11. Where a custom is that all lands held of that manor shall pass by surrender and admittance, yet the lands may be freehold, and the manner of conveyance is customary, in as much as livery is not requisite, Holt said the freeholds themselves can never be parcel of the manor, but it is service; *quare*. 11 Mod. 53. pl. 28. Pasch. 4 Ann. B. R. *Anon*.

(C) In

(C) In what Respect Copyholds partake of the Nature of Freeholds.

1. **THOUGH** copyhold land be governed by the rules of the common law concerning descents, yet it partakes not of the nature of freehold land in other respects; for it is *not affects in the heir's hands, neither shall a woman be endowed, husband tenant by curtesy, unless by special custom; neither shall a descent toll an entry.* The reason seems to be, because the estates of copyholders were at first only estates at will, and at the absolute disposition of the land, and there hath not since been any provision for those particular cases; for my Lord Coke says, that *copyholders have only a fee-simple secundum quid*; that though they are tenants at will, yet their estates shall descend to their heirs, and not to be determined by their death, and not to be subject to the will of the lord as other estates at will are, (which it seems was introduced in favour of them by some positive law, though no footsteps of it appear now) *but not simpliciter* to have all the collateral qualities of estates in fee-simple at common law, in which respects that positive law seems to have left them at large as before. Gilb. Treat. of Ten. 149, 150.

a. New Abr. Tit. Copyhold (B) 458. S. P. in totidem Verbis, but without citing Id. Ch. B. Gilbert.

(D) How it differs from a customary Freehold.

1. **THE** great difference between copyholds and customary freeholds *which pass by surrender* is, that the copyholder is in by the demise of the lord; but in the case of customary freeholds, the lord is only an instrument, and that in pleading a title to a copyhold estate, it is sufficient to shew a grant from the lord; but in customary freeholds the estate of the surrenderor must be shown, as that the surrenderor was seized in fee, and surrendered to the lord, and he granted, &c. per Holt Ch. J. 1 Salk. 365. pl. 4. Hill. 4 Ann. B. R. Crowther v. Oldfield.

[E] Of what Things it may be.

This in roll is letter (A)

1. **TITHES** may be demisable by copy of court-roll, according to the custom of the mannor, for they may be parcel of a manor, (as it seems) as well as a *rent-charge*. Contra P. 43 Eliz. B. R. between Sands and Drury.]

Fol. 498.

Cro. E. 814. pl. 3. S. C. Popham held, that

they were not grantable by copy, because a manor and tithes are of several natures, and so impossible that that which is not parcel of the manor can be demised secundum consuetudinem manerii. But Gawdy J. doubted thereof, and conceived it had been well enough if it had been so used time out of mind. — Supplement to Co. Comp. Cop. 82. S. 17. cites S. C. and says it was objected, that tithes were not grantable by copy, because it is against the nature of tithes, and none could have a property in them before the council of Lateran, and therefore it was impossible to have any custom so to grant them. But it was resolved, that they might be granted

granted by copy, if there had been a custom time out of mind so to grant them. — Gilb. Treat. of Ten. 313. cites S. C. but makes a quære. — Mo. 355. pl. 480. per cur. in the case of Hoe v. Taylor, tithes may be surrendered by copy if the custom permits it. — Cro E. 413. pl. 3. in case of Hoe v. Taylor, it was said to be adjudged *St JOHN BURKE'S CASE*, that a grant of tithes by copy was good.

[2. *Tonsura prati* may be demiseable by copy of court-roll, according to the custom of a manor, by prescription. P. 43 Eliz. B. R. per Gawdye.]

The lord by copy granted to A. and his heirs Underwood, without the soil, may be demiseable by copy. Co. Lit. 58. b.]

Underwood in *M. Wood Annuatim succidend.* by 4 or 5 acres at least, adjudged a good grant, and is exclusive of the lord; and note, they took the wood annuatim succidend. by 4 or 5 acres, to be the order appointed for cutting, and not to go in restraint of the grant. Mo. 355. pl. 480. Pasch. 36 Eliz. B. R. Hoe v. Taylor. — 4 Rep. 30. b. 31. a. pl. 23. S. C. adjudged that it may by custom be demiseable by copy; and judgment affirmed; for it is a thing of perpetuity to which custom may extend, because after every cutting it will grow again ex stipitibus. — Cro. Eliz. 413. pl. 3. S. C. adjudged, and affirmed in error. — Jenk. 274. pl. 95. S. C. accordingly. — Supplement to Co. Comp. Cop. 82. S. 17. cites S. C. — Gilb. Treat. of Ten. 208. cites 4 Rep. 31. S. P. — Ibid. 314. S. P.

— 4 Rep. 31. a. in case of Hoe against Taylor, S. P. resolved. — Jenk. 274. pl. 95. S. C. & S. P. — Co. Comp. Cop. 54. S. 42. S. P. and cites S. C.

A customary manor may [5. A manor may be demiseable by copy. Co. Lit. 58. b.]

be granted by copy, though such lord cannot hold a court baron to have forfeitures, and hold plea in a writ of right. Cro. J. 259. pl. 20. Mich. 8 Jac. B. R. King v. Stanton. — Jenk. 274. pl. 95. S. P. — And such manor may have customary tenants, for as well as there may be a tenant at will of a manor at common law, so there may be a tenant at will according to the custom of the manor; resolved. Cro. J. 327. pl. 4. Mich. 11. Jac. B. R. Moore v. Goodgame. — Bulst. 135. Goodgroom v. Moore. S. C. but S. P. does not fully appear. — 11 Rep. 17. a Mich. 10 Jac. Nevill's case, S. C. resolved clearly, per tot. cur. that a customary manor may be held by copy, and such customary lord may hold courts, and grant copies, and such customary manor will pass by surrender, and admittance, and fines shall be paid upon admittance, as well upon alienation as upon descent, and that may be customary lord mesne, and customary tenants in case where the mesnalty is a tenancy at will, according to the custom of the manor, as where there is tenancy at will at the common law of a manor; and if such customary manor be forfeited, the lord shall have the customs and services appertaining thereto. — Yelv. 190. Mich. 8. Jac. B. R. Tho King v. Staverton, S. P. And it is said, that such a customary manor cannot hold [11] a court baron, for he cannot have any franktenants to hold of him, because a copyhold manor is not capable of an escheat of freehold, for that which comes in lieu of another ought to be of the same nature, and so the freehold escheated should be copyhold which is repugnant and impossible. — Bulst. 57. 58. S. C. all the court agreed clearly against the court baron. — Supplement to Co. Comp. Cop. 79 S 15 — Gilb. Treat of Ten. 201. 202. cites same cases, and says that a customary manor may be held by copy of court-roll, ad voluntat. &c. and such a lord may grant copies; but it seems it must be of such things as have been usually demised by him; for it seems he cannot grant all his demesnes by copy, without they have been usually demised; for though they have been demised time out of mind by the superior lord by copy, that will not warrant his demise by copy, because the custom must be, that time out of mind they have been granted per dominium manerii, now they have not been granted by him that his lord of the manor, though they have by the superior lord. This case seems to prove, that a customary manor to hold courts &c. may be without any freehold services, and it may as well be objected against such a lord's holding courts, that he hath no manor, because no freehold services, but it seems he may have freehold services.

Generally all lands and tene- [6. Any thing that concerns land, may be granted by copy. Co. Lit. 58 b.]

ments within the manor, and whatever concerns lands and tenements may be granted by copy. Co. Litt. 58. b. — Any profit of any parcel of the manor may by custom be granted by copy; resolved. 4 Rep. 31. a. in case of Hoe v. Taylor. — Jenk. 274. pl. 95. S. C. & S. P. — Gilb. Treat. of Ten. 314. cites S. P. out of Ld. Coke, but says, that this must be meant where they are parcel of the manor, and not to extend to incorporeal things in gross; for they are no parcel of the manor.

It seems by Littleton, that only lands and tenements are demisable by copy, and therefore if the lord of a manor will grant *rent-charge*, or the *office of stewardship*, or *bailiwick of his manor* by copy, or a *common gross* by copy, these be not good grants, because they lie not in tenure, and also because the custom does not extend unto them, but *common appendant* to a tenement, or copyhold lands, may be demised with the tenement by copy. Calth. Reading, 54.

7. *Market, fair, and piscary* may be granted by copy. Mo. Cro. C. 355. pl. 480. Pasch. 36 Eliz. in Case of Hoe v. Taylor, 413. pl. 5. in S. C.

Fenner said, he knew a market within the manor of Crookehorne, in the county of Somerset, to be demised, by copy. — 4 Rep. 31. a. in pl. 23. S. C. and the same instance given. — Jenk. 274. pl. 95. S. P. — Supplement to Co Comp. Cop. 82. S. 27. cites S. C. — Co. Litt. 58. b

8. *Any profit parcel of a manor*, may by custom be granted by copy; resolved. 4 Rep. 31. a. pl. 23. Pasch. 37 Eliz. B. R. in Case of Hoe v. Taylor.

9. *Common and prima vestura prati* may be granted by copy, because they are parcel of the manor, but what is not *parcel of the manor* cannot possibly be demised *secundum consuetudinem manerii*; per Popham Ch. J. and therefore he held, that *tythes* could not, which was the principal point; but because upon the verdict it did not appear that it had been *granted by copy time out of mind*, it was held, that no title was found for the defendant who claimed the tythes by copy of court-roll, and therefore it was adjudged for the parson, plaintiff. Cro. E. 81+. pl. 3. Pasch. 43 Eliz. B. R. Sands v. Drury.

10. Things that lie not in tenure are not granted by copy, as *rents, bailiwicks, stewardships, common in gross, advowsons in gross*, and such like; but an *advowson appendant*, a *common appendant*, or a *fair appendant*, may pass by copy, by reason of the principal thing to which they are appendant, and generally what things soever are parcel of the manor, and are of perpetuity, may be granted by copy, according to the custom. Co. Comp. Cop. 54. S. 42. Gilb. Treat. of Ten. 313. cites S. C. & S. P. Forfirst no rent can be reserved out of them, because there can be no distress taken upon

them, and then they are not parcel of a manor which consists only of demesnes and services: but then it will be objected, that a rent service is parcel of a manor, and grantable by copy, for a manor may be granted by copy, but a rent-service may be distrained for: and if it be granted by copy, it cannot be granted alone, but lands must be granted with it, upon which a distress may be taken; and as it is a part of a manor, it is held of some superior lord; but it seems a rent-service alone cannot be granted by copy, no more then rent-charges, or commons in gross, which yet may be granted by copy, as they are appendant to any other thing. No service can be reserved or due upon the grant of incorporeal things, so that no court can be kept by the grantor, no attendance being due from the grantees of incorporeal inheritances; so as to them there is no lord, and consequently they cannot pass by surrender and admittance, [12] and so are not grantable by copy.

11. *Demefne lands* which *within time of memory* have been occupied by the lord himself, or his farmer, is not good to be granted by copy, because of the newness of the grant, yet by continuance of time it may be good copyhold, when the memory

memory of the contrary is worn away, as hath been said before; neither can the lord that granted such a copy, put out his copyholder during his life that granted the same, because he should not be received to disable his own grant. Calth. Reading 54, 55.

12. If a copyholder surrenders his copyhold into the lord's hands merely to the use of the lord, Calthorpe doubts whether the lord may grant this again by copy, as he may where it comes unto him by forfeiture, or by escheat, because it is made parcel in demesne by his own acceptance, and not by the act of the law; quære. C. lth. Read. 55.

And cites it
adjudged in
case of
Green v.
Harris.

13. A copyhold may be of a mill; adjudged. 4. Le. 241. pl. 393. Pasch. 8 Jac. B. R. Ward's Case.

14. A lease of the freehold by a copyhold to a stranger is good between the lord and the stranger; per Cur. Keb. 15. pl. 43. Pasch. 13 Car. 2. B. R. Garrard v. Lister.

Waste
ground.

15. Grant of waste by copy is void, unless so granted time out of mind. 3 Keb. 124. Hill. 24 Car. 2. B. R. Bishop of London v. Row.

16. A lord of a manor may make new grants of part of the manor to hold by copy; admitted, and a case was cited to the purpose. But Lord Chancellor said, that in the case cited such grants were made with consent of the homage; that the question in the principal case is, whether there be a custom to do it without the homage, and that must go to law, and then it will be considered by them, how far a custom to make such grants without the homage, be a good custom. Sel. Chan. Cases in Lord King's Time, 62. Mich. 12 Geo. 1. Hughes v. Games.

(F) Grant. What shall be said to pass by the Grant. Things excepted, or reserved.

1. IF the lord of a manor grants his manor for years, except bosc. and subbosc. growing in certain copyhold ground, and the lessee by his steward granteth a copyhold, within which manor there is a custom, that every copyholder may take within his copyhold, woods and underwoods growing upon the ground for necessary fuel; notwithstanding this exception in the lease of the manor, the copyholder may cut down the woods or underwoods according to the custom, for though the lessee of the manor in respect of the exception could not meddle with the woods or underwoods, yet the copyholder may, for his title is grounded upon the custom paramount the exception. Co. Comp. Cop. 54. f. 42.

2. If a copyhold be granted to a man & hæredibus, an estate tail does not pass for want of the words de corpore; and if a copyhold be granted to a man & liberis aut pueris suis de corpore, an estate tail does not pass for want of this word heirs; for what estates soever are entails since the statute De donis Conditionalibus

ditionalibus, were fee-simples conditional before the statute, without the word heirs, and therefore * no intail since the statute; and for the same reason, if a copyhold be granted to a man, and to the issues males of his body, an estate for life only passes. Co. Comp. Cop. 59. f. 49.

3. If a copyhold be granted to a man without expressing any certain estate, by implication of law an estate for life only passes. Co. Com. Cop. 59. f. 49.

4. And if I grant a copyhold to 3. *habendum successive*, they are joint tenants, unless by special custom the word successive makes their estates several. Co. Comp. Cop. 59. f. 49.

5. If the king by his steward grants a copyhold to a man and his heirs males, or heirs female, no fee-simple passes, because the lord never intended to pass such an estate. Co. Comp. Cop. 59. f. 49.

6. If a copyhold be granted to an abbot, and his heirs, an estate for life only passes. Co. Comp. Cop. 59. f. 49.

7. If a copyhold be granted to a man and to his heirs, as long as J. S. shall live, this is only an estate pur autre vie, and a render limited upon this estate is good. Co. Comp. Cop. 59 f. 49.

8. But if a copyhold be granted to a man and to his heirs, as long as such a tree shall grow in such a ground, this is a good fee, and a render limited upon it is void. Co. Comp. Cop. 59 f. 49.

9. If a copyhold be granted to J. S. and J. N. & *heredibus*, they are jointenants for life, and no inheritance passes unto either, because of the uncertainty, for want of the word *suis*; but if a copyhold be granted to J. S. only & *heredibus*, a good fee-simple passes without the word *suis*. Co. Comp. Cop. 59. f. 49.

10. If the lord makes a lease for years of the manor (*excepting all woods and underwoods*) and the lessee makes grants by copy according to the custom, the copyholder shall have wood in these woods according to the custom. 8 Rep. 107. Mich. 6 Jac. B. R. Bonham's Case.

11. A copyhold was of lands in fee; the lord by the custom had, as a profit apprender, the cut of the wood, and underwoods growing on the copyhold. The lord grants all the woods and underwoods growing, and which afterwards should grow on the said copyhold lands to A. and his heirs, whether this should not merge in the copyhold, being, as was said, only a profit apprender. The question was, if a copyholder pays a rent to the lord, and the lord grants, or releases this rent to his tenant, this shall merge in the copyhold? Sed non allocatur. Vern. R. 21, 22. pl. 14. Mich. 1681. Faulkner v. Faulkner.

* This in
roll is letter
(C)

[G] Copyhold.
Grant.

Fol. 499.

By whom it may be made. [By Domini pro Tempore or not, or Persons not having lawful Titles.]

Lessee for years granted the land for 3 lives, and held good; for the custom throughout England is, that the lord for the time being may demise by copy, &c. And this notwithstanding that he has only durante bene-placito, or at will; quod nola. Br. tenant by copy &c. pl. 27. cites 4. Ma. 1. — But it was held, that such lessee of the manor cannot demise, reserving a less than the ancient rent, but must reserve the ancient rent or more. Br. Ibid cites [14] 5 Ma. 1. — S. P. resolved, 4 Rep. 23. b. pl. 7. Trin. 26 Eliz. B. R. in case of Clarke v. Pennyfeather. — Gilb. Treat. of Ten. 183. cites S. C. accordingly, provided the ancient rents, customs, and services be reserved; for if the estate a copyholder hath in lands be an estate that hath been demised, and demisable time out of mind by copy by the lord, it is sufficient to support his estate by custom, so that no estate is required to be in the lord, but only that the copyhold land should be demised, and demisable time out of mind by the lord for the time being, so that he but lord it is enough; so that the custom, which warrants these estates, only requires that they should have been demised, and demisable by the lord for the time being, but it requires no estate to be in that lord in particular, so that he be but lord, and custom is the life and soul of a copyholder's estate, for the copyholder doth not derive his estate out of the lord's estate (for then it would determine with his estate) but from the custom which only requires a lawful lord for the time being, and therefore no regard is had to the person of the lord — And if copyhold *estates*, or comes into the hands during their time, any of them may regrant it at the will, rendering the ancient rent, customs, and services, and the lord, who has inheritance, shall be bound thereby. 4 Rep. 23. b. S. C.

If tenant pur auter vic after the death of the cestuy que vie of a manor continues in the manor, and holds courts, and makes voluntary grants by the copy, these shall not bind the lessor; for he was tenant at sufferance without any lawful interest; and writ of entry, ad terminum qui praterit lies against him, and so he is a deforfeor of the manor. 4 Rep. 24. a. b. pl. 9. Pasch. 29 Eliz. S. C. — Mo. 236. pl. 369. S. C. adjudged; so when the heir grants a copyhold, and afterwards assigns dower, the feme shall avoid the copyhold. — 1 Le. 45. pl. 59. S. C. adjudged, nisi. — Ow. 27. Rouse's Case S. C. adjudged nisi. — S. P. per Cur. Obiter. Mo. 112. in pl. 252. — S. P. in a note by the reporter. 1 Rep. 140. b. at the end of Chudleigh's Case. — S. P. agreed Poph. 71. — S. P. Bridgm. 51. — If a man seised of a manor in which are divers copyhold demisable for lives is disseised, and the disseisor grants a copyhold, being void, for 3 lives, this is not good to bind the disseised; otherwise it is of a copyhold of inheritance, because it is necessary to admit the next heir. Calth. Reading, 49.

Cro. E. 661. pl. 10. Gay v. Kay. S. C. & S. P. held accordingly by Popham and Clinch; and Popham said, that it is now without question held to be good, though not executed in the life of the particular tenant, who granted, although

although it was doubted in the E. of Arundel's Case D. 343. Trin. 17. Eliz.—But if a feme be endowed of several copyhold tenements, she cannot grant part of them by copy in possession or reversion; for one, who has a particular estate in a manor, cannot grant a copyhold, by parcels, or demise part, and retain the residue himself; per Popham. Cro. 66a pl. 10. in case of Gay v. Kay.

[4. [So] If guardian in focage grants a copyhold in reversion according to the custom of the manor, this shall be a good grant, and bind the ward, though it comes not in possession during the nonage of the ward, for he is dominus pro tempore. H. 2. Jac. B. and M. 3 Jac. B. between *Shapland and Ridler*, Adjudged.]

Guardian in Soc'ge held a court in his own name, and granted copies in reversion, and held good

against the heir. Ow. 115. 1 Jac. C. B. Shopland v. Radlen.—The custom of the manor was to admit for life, the remainder for life, and there being only a copyholder for life in possession, the guardian in focage, during the heirs being under 14, admitted one to the remainder for life, and held good, because he had a lawful interest. Godb. 143. pl. 177. Saplan v. Ridler. S. C.—Cro. J. 55 pl. 27. S. C. adjournatur.—Ibid 98. pl. 28. S. C. adjudged that the grant was good.—4 Le. 238. pl. 383 S. C. adjudged good.—S. C. cited Supplement to Co. Comp. Cop. 82. f. 17.—S. C. cited per cur. Lord Raym. Rep. 131. Mich. 8. W. 3. C. B. in case of Wade v. Baker.—S. P. by Lord Commissioner Jekyl accordingly. 2. Wms's. Rep. 122. Hill. 1722 in delivering the judgment of the court, in case of the Lord Ch. J. Eyre v. the Countess of Shaftsbury, that guardian may grant copyholds in reversion.—2 New. Abr. 684. cites 8 W. 3. C. B. Lade v. Barker, that a guardian in focage may grant copyholds in reversion according to the custom of the manor, though they *come into possession during the non-age of the infant.

* It seems misprinted and that the word (not) is omitted.

[5. If a lord of a manor *devises* by his will in writing, that his executor shall grant copies according to the custom, for payment of debts, and dies, the executor, though he hath no estate in the manor, may make grants according to the custom of the manor. M. 7. 8 Eliz. D. Manuscript cited Co. Lit. 58. b.]

[15]

S. P. and it is the same though it after appeared that the devise was void. Arg. a Le. 46.

cites 17 Eliz. Stowley's Case.—Gilb. Treat. of Ten. 190. S. P.—4 Rep. 28. b. S. P. per Cur. that the grant is good; for after the assent of the executors, he is in by the devise.—Co. Comp. Cop. 47. S. 34 S. P.

6. If a *bishop* grant customary lands by copy, and dies, the copyhold is not determined by his death, for he was dominus pro tempore, and this grant shall bind the king, and the grantee (the temporalities being in the hands of the king) shall have aid of the king. 4 Rep. 21. b. in Brown's Case cites 4 H. 6. 11. and 21 H. 6. 37.

7. If a manor be devised to one, and the *devisee* enters and makes copies, and then the *devise* is found to be void, those copies if they are new and voluntary, and not made upon surrenders, are void; per Popham. Ow. 28. cites 7 Eliz.

Co. Lit. 58. b. S. P.

8. *Fooffee* of a manor upon condition makes a voluntary grant of copyhold estate according to the custom, and after the condition is broken, and the feoffor re-enters, yet the grants by copy shall stand. 4 Rep. 24. pl. 8. Pasch. 26. Eliz. B. R. Anon. cites D. 342. [b. pl. 55. Trin.] 17 Eliz. The Earl of Arundel's Case.

Bendl. 290. pl. 89. S. C. — Jenk. 212, 243. pl. 26. S. C. resolved, that if the feoffee before or after

the condition broken, and before entry for the condition broken, grants a copyhold, the grantor shall not avoid this copyhold, for the copyholder is in by dominus pro tempore, and paramount the grant. — If a lease be made for years of a manor, the lease to be void upon the breach.

of a certain condition, if the condition be broken, and afterwards the lessee before the entry of the lessor grants estates by copy, these grants shall never exclude the lessor, for presently upon the breach of the condition the lease is void; but *has the manor been granted for life, in tail, or in fee*, Ld. Coke thinks the law would have fallen out otherwise; for before entry the frankfelement had not been avoided, and whereforever a man may enter and avoid any estate of frankfelement upon the breach of a condition, the law adjudges nothing to be in him before entry, and he may waive the advantage which he might take by the breach of the condition if he will, and therefore, notwithstanding the accruer of the title of the grantor; yet before this title be executed by entry, the grantee has such a lawful interest, that what estate forever he grants by copy in the interim, shall stand good against the grantee. Co. Comp. Cop. 48. f. 34.—Gillb. Treat. of Ten. 187. S. P. and yet it is a rule, that when a man enters for condition broken, he shall be in of the same estate he was in before, and therefore shall avoid all mean charges and incumbrances; but the copyholder doth not claim his estate out of the lord's grant, but out of the custom, and if the grants were made after the condition broken, yet it is all one; for before entry the feeoffee has a lawful estate, and the feeoffee may waive the advantage of the condition broken; but if a lease be made of a manor for years upon condition to be void upon the breach of a certain condition, and the condition is broken, no voluntary grants made afterwards shall bind the lessor, because the estate of the lessee is void; but if it were for life &c. then the grants were good.

Ibid. says, that it was so ruled in the court of wards, Mich. 38 &

9. A lord *for life, or any other particular tenant* that hath an interest in a manor, may grant copies in *reversion*, though they be not executed in the life of the grantor. Mo. 147. pl. 292. Hill. 26 Eliz. Carew's Case.

39 Fliz. in Welsh's Case; and that in the same case of Welsh it was so adjudged afterwards in B. R. Pasch. 41 Eliz. upon a special verdict returned there.—Mo. 95. pl. 236. Hill. 14 Eliz. S. P. and Wray, and Dyer, and all the justices of C. B. held the copy not good, but Manwood and Popham held e contra; but they all agreed, that if it comes into possession before the death of tenant for life, that then it is good.—To make such grant good, there should be a custom to enable the lord to grant in reversion. Mar. 6. pl. 13. Pasch. 15 Car.—Ld. Coke says, that if there be *lessee for years* of a manor, and he *grants lands by copy in reversion*, that *unless the reversion happen in possession before the lease for years expires, the grant is void*; the reason seems to be, because now he makes a grant, which is only to take effect after his estate ended in point of possession, and so will bind the future lord's interest, but let his own be at large without any grant by copy, which by construction they will not admit, but take the rule strictly, that he that is dominus pro tempore of a particular estate must grant in possession; and to this purpose is LORD OF OXFORD'S CASE; but it is agreed on all hands, that if it come in possession during the

[16] continuance of the lord's estate, that it is good: but there is the CASE OF GAY V. KAY where it was held good notwithstanding it did not come in possession; and there it was said, that it was custom only warranted the grant, which might as well warrant a grant in reversion as possession, and if the custom will warrant the grant of a fee simple in possession by such particular tenant, why not a reversion in fee? And the like resolution was made in SIR PETER CAREW'S CASE. It seems the first ground of this law, that the lord for the time being might grant copyhold estates, was, because copyholders were only tenants at will, and so though the lord pro tempore had but a particular estate, and yet granted the lands in fee, yet that was no prejudice, but rather an advantage to the lord that was to have the manor, in respect of the service he was to have done him afterwards, and if he had a mind he might put out his tenant at his own pleasure; but this uncertainty of the copyholder's estate being found inconvenient, it was afterwards adjudged, that he should retain his land, and not be subject to the pleasure of the lord, but the other part of the law was left as before, viz. that lords for the time being might grant lands in fee though they themselves had but a particular estate, and this custom being continued to this day, is what warrants the grants by copy; for it is most certain those estates that are granted by lords that have a particular interest, cannot be derived from the interest of the lords, for if they were, they must determine when the lord's estate determines, for nemo plus juris dare &c. therefore where there has been a custom that such lands have been granted time out of mind by copy in fee by the lord, there the custom gives the estate, and the lord is but custom's instrument to convey even where he has them in his own hands, and may, if he pleases, retain them, Gillb. Treat. of Ten. 191. 192. 193.

10. If the *queen be tenant for life of a copyhold manor*, and a copyhold of inheritance *escheats* to her, she may grant it again to whom she pleases, and this shall bind the king, his heirs, and successors for ever; for she was domina pro tempore, and

and the custom of the manor shall bind the king; adjudged. 4 Rep. 23. b. Trin. 26 Eliz. Clark v. Pennyfeather.

11. A. seised of a manor, in which were copyholds, dies, leaving M. his widow, who demanded the 3d part of the manor for her dower, by the name of 100 mesuages, 100 gardens, 2000 acres of land &c. and was accordingly endowed of parcel of the demesnes and parcel of the services of the copyholds, and afterwards she granted a copyhold, and if this was good was the question; for if she had a manor the grant was good, otherwise not; but held, that it was not; for though she might have demanded a 3d part of the manor, yet by demanding it by the name of 100 mesuages &c. she could have no manor; for a manor must be claimed by its name of incorporation, as Anderson termed it, and not otherwise, and then 100 mesuages &c. cannot be said to be a manor, and so the grant by her, who had no manor, is void; per tot. Cur. Goldsb. 37. pl. 11 Mich. 29 Eliz. Brook's Case.

Ow. 4. Bragg v. Brook. S. C. held accordingly. — Godb. 185. pl. 156. Bragg's Case, S. C. held accordingly, per tot. Cur. but if she had made a demand of the 3d part of manor, then she had had manor, and might have kept courts, and

granted copies. And the pleading in that case was that she did recover the 3d part of the manor per nomen of certain mesuages and acres and rents which was held to be no recovery of the 3d part of the manor. By dower of the 3d part of a freehold manor she shall have a special court baron, because she is in by act of law; admitted; Arg. Skin. 193.

12. A grant of a copyhold by an infant is good, for the copyholder is in by the custom, and shall bind the infant; as a presentation by an infant to a church is good. Noy. 41. 43 Eliz. Reeve v. Martin.

4 Rep. 23. b. pl. 7. Trin. 26 Eliz. B. R. Clark v. Pennyfeather. S. P.

per Cur. &c. of non compos. — 8. Rep. 63. b. S. P. per Cur. — The same law of a feme covert. 4 Rep. 23. b. and 8 Rep. 63. b. — But the baron and feme ought to join in the grant; per Walmley, J. Cro. J. 99. pl. 28. — Co. Comp. Cop. 46 f. 34. S. P. — Gilb. Treat. of Ten. 184. cites same points.

13. Tenant in tail of a manor wherein copyholds are demisable for life &c. for a certain rent; the copyholder for life dies, and the lord assigns it by indenture for 21 years, rendering the ancient rent &c. and by the better opinion of the Court it is good; within 32 H. 8. For it is not any prejudice to the issue as to the rent. Noy. 106. Mich. 43 and 44 Eliz. C. B. Ld. Norris's Case.

14. He that enters on condition to retain till satisfied, cannot grant copies; per Walmley J. Cro. J. 99. Mich. 3 Jac. Br. in Case of Shoplane v. Roydler. [17]

15. R. B. Esq; being seised of the manor of H. for life, within which are many copyhold tenants, granteth the stewardship thereof by deed under his hand and seal to W. S. for life, with a fee of 10s. for executing thereof, and afterwards becomes lunatick, and non compos mentis, and so found by inquisition; and thereupon committed to E. C. Esq; and others under the seal of this Court. Resolved by the Ld. Ch. J. Hobart, and Ch. B. Tanfield, that the said committes cannot grant any copyhold estate, for that they themselves by law have no estate in the said manor, nor are lords there-

Gilb. Treat. of Ten. 295. 296. cites S. C.

of for the time being, but the said lunatick by his steward may grant copyhold estates according to the custom of the same, whereupon it was decreed accordingly. Nevertheless it was ordered, that the said steward should grant none without the *privy of the committees*, nor before the Court was acquainted therewith, and gave warrant for the granting thereof; but note, this was in discretion, and the grant by the steward good in law, and this merely by way of caution, for the benefit of the said lunatick, and jurisdiction of the Court. Ley. 47, 48. 9 Jac. Blewit's Case.

16. If *tenant at will* of a manor grants copies, and reserves rents and services, those rents and services are annexed to the manor after the will determined, though the lord of the manor does not claim by, or under, but above him, and without any privy of estate; per Cur. 11 Rep. 18. a. Mich. 10 Jac.

Ow. 18.
Rouse's
Case.

17. *Lessee for years of a seignory, after the term expired when he was become tenant at sufferance, may take a surrender*; per Doderidge J. 2 Roll. Rep. 181. Trin. 18. Jac. B.R. says: it was adjudged in B.R.

18. In *voluntary grants made by the lord himself*, the law neither respecteth the quality of his person, nor the quantity of his estate; for be he an infant, and so through the tenderness of his age insufficient to dispose of any land at the common law, or *non compos mentis*, an *idiot*, or a *lunatick*, and so for want of common reason unable to traffick in the world, or an *outlaw in any personal action*, and so excluded from the protection of the law, or an *excommunicate* &c. and so restrained ab omnium fidelium communione, or at least a sacramentorum participatione, notwithstanding these infirmities and disabilities, yet he is capable enough to make a voluntary grant by copy. Co. Comp. Cop. 46. f. 34.

19. If a *feme seignior* take *baron*, and they two join in a *voluntary grant by copy*, this shall ever bind the feme and her heirs, and yet she is not sui juris, but sub potestate viri, because the custom of the manor is the chief basis upon which stands the whole fabrick of the copyhold estate. Co. Comp. Cop. 46. f. 34.

20. If a *manor is granted on condition*, and before the condition is broken the land is granted by copy, then the manor becomes forfeited, and the feoffor entreth, yet the copyhold estate remains untouched because lawfully established by custom, and yet all mean estates and charges whatsoever granted by the feoffee at the common law were voidable upon the entry of the feoffor; for we have a ground in law, that when an entry is made for breach of a condition, the party to all intents is in the same plight that he was in at the time of the making of the estate. Co. Comp. Cop. 46, 47. f. 34.

21. If the lord or he (whosoever he be) that makes a voluntary grant by copy, has no lawful interest in the manor, but only an *usurped title*, his grant shall never so bind the right owner,

owner, but that upon his entry he may avoid them, otherwise we should make custom an agent in a wrong, which the law will never suffer. Co. Comp. Cop. 47. f. 34.

22. If a *disseisor of a manor dies seised*, notwithstanding his heir comes in by ordinary course of descent, yet because the tort commenced by his ancestor is still inherent to his estate, if any *copyhold estate be granted by the heir*, it may be avoided by the *disseisee immediately* upon his recovery, or upon his entry. Co. Comp. Cop. 47. f. 24.

23. So if a *disseisor enfeoff a stranger of the manor*, notwithstanding the *feoffee come in by title*, yet no grant made by him of copyhold land shall ever bind the *disseisee* no more than a grant made by the *disseisor himself*. Co. Comp. Cop. 47. f. 34.

24. If *tenant in tail of a manor discontinues and dies*, and after the *discontinuee grants copyhold estates*, the heir recovering in a *formedon* in the descender may avoid the grants; for though the *discontinuee comes in under a just title*, yet his interest being determined by the death of the tenant in tail, the continuance of the possession is a tort to the heir, and acts done by tortfeasors tending to the disinheritation of the right owners custom will never so strengthen, but that they may be annihilated. Co. Comp. Cop. 47. f. 34.

Gilb. Treat. of Ten. 296. S. P. and cites S. C.

25. If a *man seised of a manor in right of his wife alien the manor and dies*, any grant made of copyhold estates after his death may be avoided by the *feme* upon her entry, or her recovery, in a *cui in vita*. Co. Comp. Cop. 47. f. 34.

So if he alone grants copies and dies, it seems that after his

death she may avoid them; for he had nothing but in *jure uxoria*. Ten. 312.

Gilb. Treat. of

26. A man seised of a manor in fee has issue a *daughter*, and dies, his *wife privement enfeint of a son*; she makes grants by copy, and afterwards a son is born; voluntary grants made by her are good, for she was *legitima domina pro tempore*. Co. Comp. Cop. 47. f. 34.

Gilb. Treat. of Ten. 189. S. P.

27. *Feoffee of a manor on condition to enfeoff another the next day*, makes voluntary grants by copy, this shall bind. Co. Comp. Cop. 47. f. 34.

Gilb. Treat. of Ten. 189. S. P. For he was do-

minus pro tempore.

28. Lord of a manor commits felony, and after *exigent granted he passes away copyhold estates, and then is attainted*, his voluntary grants are good; for he was *dominus pro tempore*, though by relation the manor was forfeited from the time of the *exigent* awarded. Co. Comp. Cop. 47. f. 34.

So, if he were convicted by verdict or confession. Ibid. —

Gilb. Treat. of Ten. 189.

both the same points.

29. If a *manor be granted with a feme in frank-marriage, and there is a divorce had causa præcontractus*, so that now the interest of the manor is granted to the *feme* only, and by relation

relation the marriage is void ab initio, yet because the *baron was legitimus dominus pro tempore*, any copyholders estates granted before the divorce remain good. Co. Comp. Cop. 47. f. 34.

30. If a man espouses a *feme seignioresi* under the age of consent, and after she doth disagree, though the marriage by relation was void ab initio, yet *copyholdes granted before disagreement shall never be avoided*, *causa qua supra*. Co. Comp. Cop. 47. f. 34.

Gilb. Treat. of Ten. 188. 189. S. P. says, that in this case and in cases of grants made

31. If an *infant infeoffs* me of a manor, though he may enter upon me at his pleasure, yet grants made by me by copy before his entry shall never be defeated by any subsequent entry. Co. Comp. Cop. 48. f. 34.

after the condition broken, the grantor hath a defeasible title, and yet the estates are good that are granted to the copyholders; yet may * Lord Coke say, that if any [19] one has a tortious or defeasible estate, subject to the action or entry of another, his voluntary grants shall not bind. To reconcile this, it seems my Lord Coke must be understood, that when any one hath an estate, to which another has a right at present, that the owner of such a defeasible estate cannot make voluntary grants, but the infant and the feoffor have no such right; for the feoffees in both cases have lawful and rightful estates in the land till they are defeated, and before they are defeated the feoffors have no right.

* 4 Rep. 24. a. pl. 7. Trin. 26 Eliz. S. P. unanimously agreed in B. R. in case of Clarke v. Pennyfeather.

32. If a *parson after institution, and before induction, a manor being parcel of his glebe lands, grants lands by copy, and after is inducted*, this admitting of the copyholders is no binding act; for though as to the spiritualities he be a compleat parson presently upon the institution, yet as to the temporalities he is not compleat before induction. Co. Comp. Cop. 48. f. 34.

Gilb. Treat. of Ten. 190. 191. S. P. but says *quare tenent.*

33. So if a parson be admitted, instituted, and inducted, but does not subscribe to the articles according to the 13 Eliz. and grants lands by copy as before, this grant shall not conclude the succeeding incumbent, because his admission, institution and induction, were wholly void in themselves. Co. Comp. Cop. 48. f. 43.

34. But had the parson been deprived for crime of heresy, or for being mere laicus, although he be declared by sentence to be incapable of a benefice, and so his presentment void (ab initio,) yet because the church was once full, until the sentence declaratory came, although the deprivation shall relate to some purposes, yet because the *presentment is not in itself void*, surely a relation shall never be so much favoured as to avoid a copyhold estate in this kind. Co. Comp. Cop. 48. f. 34.

35. If a manor be granted *pur auter vie*, and *cestuy qui vie dies*, and the grantee continues still in the manor, and makes grants by copy, these shall not bind the grantor of the manor, for immediately upon the death of *cestuy que vie*, the grantee was but a tenant at sufferance, and had no manner of lawful interest; for a writ of entry ad terminum qui præterit lies against him as against deforcor. Co. Comp. Cop. 48. f. 34.

36. And

36. And so if a tenant for life of a manor makes a lease for years of the same manor, and dies, copyhold estates granted by the lessee after the death of a tenant for life are voidable by the first lessor. Co. Comp. Cop. 48. f. 431.

37. Grants made an alienation in mortmain before the lord paramount has entered for a forfeiture shall not be defeated. Co. Comp. Cop. 48. f. 34.

38. A lord to grant or allow a copyhold must be such a one as by Littleton's definition is seised of a manor, so that he must be in possession at the time of the grant, for although he have good right and title, yet if he be not in possession of the manor, it will not serve; and on the other side, if he be in possession of the manor, though he have neither right nor title thereunto, yet in many cases the grant and allowance of such a copy is good, as dominus de facto, sed non de jure; and in some cases a copyhold shall be adjudged good, according to the largeness of the estate of the lord that granted the same, and in some cases shall continue good for a longer time than the estate of the grantor was at the time of the grant; but that is to be understood in case of necessity, otherwise it will not be allowed. Calth. Read. 48, 49.

39. If a man have a title to enter into a manor for a condition broken, and he grants a copyhold of the same manor (being void) at a court baron, this is a good grant, for the keeping of the court amounts to an entry into the manor. Calth. Reading. 49.

40. A man seised of a manor for life whereunto is copyhold of inheritance belonging, and a copyholder surrenders to the use of a stranger in fee, the lord may grant this in fee, and this grant shall bind him in the reversion; but if the copyholds are demisable for lives, it is otherwise, for then he cannot upon surrender grant the same longer than the life of the grantor. But if the lord of a manor for years, or during the minority of a ward, of which the copyholds are demisable for 3 lives successively, and not survivingly, in this case, if the copyholder dies, the lord may grant the same being void for 3 lives at his pleasure, and this shall bind him in the reversion, or the heir of his full age. Calth. Reading. 50. [20]

(H) Grants by whom. Good. Where the Manor is divided.

1. **TENANT** in dower of the 3d part of a manor has a manor, and may keep court, and grant copies. Godb. 135. pl. 156. Mich. 29 Eliz. in Bragg's Case.

2. The lord by his own act cannot make of one and the same manor, at common law, 2 several manors, consisting of demesnes and freeholders; but he may by his own act make a customary manor, consisting of copyholders, to hold courts, and make admittances and grants of copyholds. 4 Rep. 26 b. Trin. 30 Eliz. in a nota of the reporter, at the end of the 3d resolution, C 4

Gilb. Treat. of Ten. 198, 199. cites S. C. says, that when the grant is of all the copyhold

lands, there is still but one court for copyholders, which there was in effect when the manor consisted of freeholders.

4 Rep. 26. a. b. [pl. 12. Melvich v. Luther] was cited: that this was a good copy. But it was answered, that it was a strange judgment, and never was entered by direction of the court, and that in error brought thereon in

the Exchequer chamber, the opinion of the justices was, that it was erroneous, and that thereupon the copyholder compounded, and took only his corn, and relinquished the title. Cro. E. 443. in S. C. — Cro. E. 203. the same remark in a nota there, at the end of the case of Melvich v. Luther, mentioned there by the reporter, as told him by Ewens, who was of council in the cause. — Gilb. Treat. of Ten. 197. says, that there are precedents that such grantee of the inheritance of copyhold lands cannot keep court no more than the grantee of the inheritance of one copyhold, and takes notice of what is mentioned in Cro. E. as above, of the opinions of the justices and barons in the Exchequer chamber, and that the parties compounded.

[21]

4 Rep. 26. b. 27. a. pl. 13. S. P. in a nota by the reporter, in the case of Neale v. Jackson, Falch 37 Eliz. C. B. and cites Murrell's Case, which is at 4 Rep. 24 b. 25. a. 33 & 34 Eliz. B. R. + 4 Rep. 26. b. Neale v. Jackson, S. P. — Cro. b. 102. pl. 10. S. C. — But see the case of Bright v. Forth, supra. pl. 3. and the notes there.

3. A. was lord of the manor of C. which extended into B. and C. &c. and in B. were divers copyholders for life. A. suffered a recovery of the manor, excepting the land in B. Afterwards A. conveyed the part which extended into B. to J. S. and A. and J. S. kept a court at B. and the steward granted a copyhold, being a copyhold for life, to the plaintiff. Resolved, that the grant was void, because there was not any such manor of B. before or now; and per Anderson, if such severance had been of copyholders of inheritance, the copyholders and their heirs should have had it, but it can never be surrendered; for surrenders are by custom, and therefore they ought to be in the court of the manor, and a surrender to the lord himself in his house, or out of court, is not good, quod Beaumont concessit. Cro. E. 442. pl. 6. Mich. 37 & 38 Eliz. C. B. Bright v. Forth.

4. A. seised of a manor consisting of services, demesnes, and 50 copyholds, grant to B. the moiety of 20 of them &c. and afterwards confirmed his former grant, and granted the moiety of the manor. A's estate came to C. and B's to D. and then C. and D. held a court, and join in the grant of the copyholds to maintain the grant. It was argued, that before the grant to B. it was a compleat manor, and while such it had 2 courts (viz.) a freeholder's court, and a copyholder's court, so that by the grant of the moiety of 20 copyholds, the freehold part of the manor is not touched, but only a moiety of 20 copyholds, and so a copyhold court might be held for 20 tenements, and as to the other 30 they may remain as they were before; but as to the moiety of 20 tenements, they might keep court alone, and grant moieties: suppose the intire interest of 20 copyholds had been granted, then they might have held courts, and the difference is, between one tenement being granted and more; for if more than one be granted, then the grantee may hold courts, and make admittances, this being for the benefit of the tenants; so that † had it been for 20 copyholds it had been good, whereas this is of a moiety; had it been of a moiety of all they had been tenants in common, and might have joined in keeping courts, and if so, why not when a moiety of 20 is granted? the court advisare vult, but inclined for.

for plaintiff accordingly. Skin. 191. pl. 6. Trin. 36. Car. 2.
C. B. Lemon. v. Blackwell.

(I) Grants by Jointenants.

1. **TWO** jointenants of a manor. One grants a copy; the same is void; for he is not dominus pro tempore; per Anderson Ch. J. Le 234. pl. 316. Mich. 32 & 33 Eliz. obiter, in Case of Lancaster v. Lucas.

If there be jointenants of a copyhold, one cannot alien the whole,

but if there be two jointenants of a manor, and a copyhold escheats, one of them may grant this copyhold, and his companion shall never avoid any part of it. Co. Comp. Cop. 48. f. 34.

If there are two jointenants of a manor, and a copyhold escheats, one may grant the whole, for he is dominus pro tempore, and is seised per my and per tout. Gib. Treat. of Ten. 312.

(K) Voluntary Grants. Good. And how considered.

1. **WHEN** copyhold lands come into the lord's hands by escheats or forfeiture, he may grant them by copy, rendering a greater rent, but not when he admits a tenant. 2 Roll. Rep. 236. Mich. 20. Jac. B. R. Smith v. Reynard.

2. If the copyholder (voet) (will) [but it should seem rather (poit) may] privileged any to cut trees, the lord may in his new grant restrain it upon condition, and yet the copyhold is not destroyed by it. 2 Roll. Rep. 236. Mich. 20 Jac. B. R. Smith v. Reynard.

(L) Grants of Copyholds. To whom they [22] may be made.

1. **THE** same persons that are capable of a grant by the common law are capable of a grant by copy, according to the custom of the manor. Co. Comp. Cop. 49. f. 35.

2. An infant, a man non sanæ memoriæ, an idiot, a lunatick, an outlaw, or an excommunicate, may be grantees of a copyhold estate. Co. Comp. Cop. 49. f. 35.

3. The lord himself may take a copyhold to his own Use. Co. Comp. Cop. 49. f. 35.

4. One jointenant may receive a copyhold from the hands of his joint-companion, because it passes by surrender, not by livery. Co. Comp. Cop. 49. f. 35.

5. A feme covert may be a purchaser of copyhold, and this purchase shall stand in force until her husband disagrees. Co. Comp. Cop. 49. f. 35.

6. He shall be said a person sufficient to be a copyholder, who is of himself able, or by another, to do the service of a copyholder; as an infant may be a copyholder; for his guardian, and

and prochein any may do the services; so a *feme covert* and her husband shall do the service; but a *lunatick*, or *ideot*, cannot be a copyholder, because they cannot do the service themselves, nor depute any other, and the lord shall retain the copyhold of an *ideot*, and not the queen. Calth. Reading. 51, 52.

7. A *bond-man* or *alien born* may be a copyholder, and the king or lord cannot seize the same. Calth. Reading. 52.

8. But a man cannot be a copyholder unto a manor, whereof he himself is lord, although he be but dominus *pro termino annorum*, or in *jure uxoris*. Calth. Reading. 53.

This in Roll
is letter (D)
in fol. 499.
Sec (N. b)

(L. 2) Grant. *At what Place* it may be made.

[1. THE lord of a copyhold manor may himself grant a copyhold at any place out of the manor. Co. 4. 26. b. between Melwich and Luter.]

(M) Grants. How they may be made, and of what.

For the
grant as to
the trees
which shall
grow after-
wards is
void. Mo.
94. pl. 34.
Anon. S. C.
— 3 La.
[23]
29. pl. 57.
Mich 15
Eliz. C. B. Anon. S. P. as to a lease of lands and bargain and sale to the lessee of the woods growing, but that was not (as it seems) of copyhold lands.

1. IF the lord grants to his copyholder the trees growing upon the lands, and which shall after grow, with liberty to cut them down, and carry them away, he may justify the cutting of the trees which are growing, and it shall not be a forfeiture of his copyhold, because the lord hath by his grant dispensed with it, but he cannot cut down the trees which shall thereafter grow, as it was said by Plowden and Popham. Supplement to Co. Comp. Cop. 80. f. 13. cites Pasch. 12. Eliz. in B. R., Mo. 94.

2. One who has a particular estate in a manor cannot grant a copyhold by parcels, or demise part, and retain the residue himself; and therefore if a feme be endowed of several copyhold tenements, she cannot grant part of them by copy in possession or reversion; per Popham. Cro. E. 662. in pl. 10. Pasch. 41 Eliz. B. R.

3. If the steward diminishes the ancient rent and services it is a void copy. Cro. E. 669. pl. 13. Mich. 41 and 42 Eliz. B. R. in Case of Harris v. Jayes.

4. If the lord of a manor having ancient copyhold in his hands, will by a deed of feoffment, or by a fine, grant this land to one to hold at the will of the lord according to the custom, yet this cannot make a good copyhold. Calth. Reading. 47.

5. In grants made upon forfeitures &c. the ancient services must be reserved, and the customs also. The reason of this seems to be, because there is nothing but custom to warrant the grant

grant by copy, which ought to be strictly pursued as to the estates, customs, services, and tenure, or else it is not the estate that was demised before; *but yet if there be a copyholder in fee, it seems the lord may release part of the services, and not to do any prejudice to the copyholder's estate, for there is an estate there in being that appears to be the old estate; but when the lord grants a new estate by copy, since it is an estate against common right, and warranted only by custom, that must be chiefly pursued to bind the heir.* Lord Coke says, * if the ancient customs and services be not reserved, the grant by copy will not bind the heir or successor. This being spoken so generally, seems to intimate plainly, that if the ancestor hath a fee in the manor, and he grants without observing the custom, his heir may avoid it, because it being a grant against common right, the custom must be pursued. (*Quære Cro. E. 662. 1 Roll. Ab. 499.*) Besides, he puts heir in the same equipage with successor, and if he means with the consent of dean and chapter, then a bishop had as much power as an ancestor; if he means without the consent, yet it is not that should avoid the grant, but the non-reservation of the ancient tenures. And *so strict is the law* in this point, that if the rent be reserved in silver, where anciently it was in gold, or payable at two feasts, where anciently it was payable at one feast, or if two copyholds escheat, one usually demised for 20s. and the other 10s. and he demises both for 30s. so if 3 acres escheat held by 3s. and he grants one by copy, reserving 1s. this is not good; for the custom, which is the only thing that warrants such grants, must be pursued. *Gilb. Treat. of Ten. 185, 186, 187.*

* See Co.
Comp. Cop.
52. S. 41.

(N) Grants. How several Estates are granted in one Copy.

1. **A.** *Seised of copyhold lands of the part of his father, and of other copyhold lands of the part of his mother, and thereof died seised, his son and heir is admitted by one copy and one admittance; if that son dies without issue, the copyholds shall descend severally, the one to the heir of the part of the father, the other to the heir of the part of the mother.* [24] *Arg. 3 Le. 109. pl. 158. Trin. 26 Eliz. B. R. in Case of Taverner v. Cromwell.*

2. *The tenend. per antiqua servitia &c. in the single copy, continues the several tenures, though the parcels are all put into one copy.* *Resolved, 4. Rep. 27. b. pl. 16. Trin. 26 Eliz. B. R. Taverner v. Cromwell.* 3 Le. 109. pl. 158. Taverner v. Cromwell, S. P. but not yet resolved.

3. *Fines assessed severally where the copyholds are several, and the demand must likewise be several.* *4. Rep. 28. a. pl. 16. Mich. 42 and 43 Eliz. Br. R. Hubbard v. Hamond.* Cro. E. 779. pl. 13. Dalton v. Hamond S. C. & S. P. resolved, for perhaps the heir may accept the one at the fine assessed, and refuse the others upon

4. If customary land hath been of ancient time grantable in fee, and now of late time for the space of 40 years hath granted the same for life only, yet the lord may, if he please, resort to his ancient custom, and grant it in fee. Le. 56. pl. 70. Pasch. 29 Eliz. C. B. Kemp v. Carter.

Supplement
to Co.
Comp. Cop.
82. f. 16.
cites S. C.

5. If customary land within a manor hath been grantable in fee, if now the same ascends to the lord and he grants the same to another for life, the same was holden a good grant, and warrantable by the custom, and should bind the lord; for the custom, which enables him to grant in fee, shall enable him to grant for life, and after the death of the tenant for life, the lord may grant the same again in fee, for the grant for life was not any interruption of the custom &c. which was agreed by the whole Court. Le. 56. pl. 70. Pasch. 29 Eliz. C. B. Kemp v. Carter.

Ld. Raym.
Rep. 994.
S. C. ad-
judged.—
3 Salk. 181.
pl. 1. S. C.
adjudged,
but Powell
J. doubted.

6. Custom in a manor to grant lands by copy to 2 or 3 persons for their lives, habend. successive &c. Grant to A. habend. to him during the lives of A. B. & C. is warranted by the custom. 1 Salk. 188. Hill. 13 W. 3. B. R. Smartle v. Penhallow.

6. Mod. 63. S. C. and the grant held good.

(P. 2.) Customs. Pleadings.

1. A Custom is alledged *quod infra maner. prædictum talis habetur nec non a toto tempore cujus &c. non existit, habebatur consuetudo (viz.) quod quilibet tenentes prædictorum tene-mentorum vocat Collins &c. have used to have common in such a place of the manor*, this was held well as well for the form as the matter, and that such a prescription might be applied to one copyholder. For copyholders cannot prescribe by reason of the baseness of their estate in their own names, but in the name of the lord, as to say, that the lord of the manor, and all his ancestors, and those whose estate he hath, have had, in such a place for him and his tenants at will &c. as 22 H. 6. 51. a. and this shall serve when a copyholder claims common or other profit in the land of a stranger; but when he claims common or other profit in the soil of the lord, he cannot prescribe in the name of the lord, nor in his own name, but prout supra. 4. Rep. 31. b. 32. Mich. 18 & 19 Eliz. B. R. Foiston v. Cracherode.

2. It was pleaded, that the copyholders of the manor of B. C. that the lands were demised and demisable time out of mind; but adjudged ill, because it is not certain whether they were demised for years, life, in tail, or in fee; and it was also shewn, that the lands were granted by the steward, but did not shew his name which is issuable. Sav. 131. pl. 205. Pasch. 36 Eliz. The Archbishop of Canterbury's Case.

3. Copyholders in alleging a custom need not shew their estates in certainty, but if any tenants of freehold at common law will claim any such benefit, they ought to shew their estate,

estate, and the names of the tenant in fee by a que estate; per Saunders; Arg. 2 Saund. 326. Pasch. 23 Car. 2. in Case of Hoskins v. Robins.

(P. 3.)* Of Grants in Reversion. Where. And by whom. And Pleadings. See (G) pl. 3. 4.

1. **I**N *trespass*; the defendant pleaded that the place was copyhold, and that a grant was made to S. who granted it to him, &c. The plaintiff replied, that before the grant pleaded by the defendant, A. L. was lessee for life, according to the custom of the manor, and that the custom is, that the lord may grant copies as well in reversion as in possession, and that M. being lord of the manor, granted a copy in reversion to the plaintiff before the grant made to S. and that after the death of A. L. he entered &c. The defendant rejoined, that there is a custom in the manor, that the lord may grant copies in reversion, by the agreement and consent of the tenant in possession and not otherwise, *absque hoc* that they are grantable modo & forma; and upon demurrer Walmley Serjeant argued, that this rejoinder was ill and repugnant, for the words (if any copy may be granted) imply, that there is such a custom, and then the traverse of the custom is void, and so is the custom itself. Gouldsb. 103. pl. 8. Mich. 30 & 31 Eliz. Plimpton v. Dobynett.

3 Le. 226. pl. 503. Mich. 31 Eliz. C. B. Anon. but S. C. and it was answered by the counsel of the other side, that this custom might have a lawful beginning, and might be grounded on the reason of the common law, that a remainder should not be without

the assent of the particular tenant, and so the custom might be good. The court delivered no opinion in the case, but it was adjourned.—Godb. 140 pl. 171. Anon. but S. C. argued, sed adjournatur.—Supplement to Co. Comp. Cop 84. f. 19. cites S. C. and that it was said, that this custom might be good, for it might be so agreed and granted by the lord at the beginning, upon the creation of the manor; and that it seemed to be grounded upon the reason of the common law, that a remainder should not be without the assent of the particular tenant, and to commence with his estate, and that therefore it was a good custom. Quære the case; for it was not resolved, Mich. 31 Eliz. in C. B.—Nels. Lex. Man. 98. pl. 11. cites Gouldsb. 103. S. C. and that it is a void custom, but this seems to be his own opinion only, and not warranted by either of the books above cited.—And 3 Nels. Abr. 355. pl. 5. cites S. C.

2. If a man (it was said) be seised of a manor, whereof there are divers copyholders admittable for life or for years, and he leases the manor to another for term of life, the lessor [lessee] may make a demise by copy in reversion, to commence after the death of the first copyholders, and that is good enough; but the custom of some manors is to the contrary, and that is allowed. Hetl. 54. Mich. 3 Car. C. B. Davies v. Fortescue.

If a lessee for years of a manor grants a copyhold in reversion, and before the reversion happens the term is expired, the grant is

void; and so I. d. Coke takes the law to be, if the lessee surrenders his term, and then fore his lease should have ended in point of limitation the reversion falls, yet the grantee shall not have it Co. Comp. 48. f. 34.

3. There ought to be a custom to enable a lord of a manor to grant a copyhold in reversion. Mar. 6. pl. 13. Pasch. 15 Car. Anon.

Gilb. Treat. of Ten. 306. cites S. C. and says, if this be un-

derstood where Copyholds are only grantable for life, it seems reasonable enough; but where they

they have been granted in fee, there if the lord grant to one an estate for life, that he may not afterwards grant reversion in fee to another, seems very unreasonable.

* (P. 4) To whom Copyhold granted for his own Life, and the Lives of others shall descend, or go upon Death of Grantee.

1. A. Took a copyhold estate *for the life of himself and B. and C. and dies.* His son, who was neither of the nominees, enters, enjoys, and dies intestate. J. S. administered to the son. There is no custom in the manor that the first taker might surrender, nor have they any custom where the copies run successive. Lord Jefferies decreed for the administrator. Vern. 415. pl. 394. Mich. 1686. *Howe v. Howe.*

This in Roll
is letter (R)
in fol. 504.

[P. 5] Surrender to an Use.
Admittance.

[*And in what Cases the Lord shall take as an Occupant, &c.*]

S. P. by Walmsley. J. Cro. E. 442. in pl. 4.—Cro. C. 205. pl. 10. Mich. 6. Car. B. R. S. P. per. Cur. For in such case the surrenderee is in quasi by the copyholder, and by his death the copyholder shall have it again.

[1.] If a copyholder in fee surrenders to the use of another for life, no more passes from him but what will serve the estate limited in use. Co. 9. Marg. Podger 107. per Coke.]

Ibid. says the case was further, viz. that the baron and feme would release all the feme's right to C. but the lord would not receive it, nor hold a court for

[2. If a baron seised in the right of his feme for life of a copyholder, the reversion being granted to B. the remainder to C. for their lives; and the baron surrenders to the use of B. for his life, to whom the lord grants it for his life, and so he is admitted tenant, and after dies, in this case the baron shall not have it again during the life of his feme, inasmuch as he hath dismissed himself of it, and C. cannot have it during the life of the feme without the surrender of the feme, and therefore the lord shall have it as an occupant during the life of the baron. D. 9 El. 164. f. 38.]

that purpose, that in Mich. term after it was decreed, that the lord hold a court &c. or avoid the possession.—S. C. cited Cro. C. 205.—S. C. cited per cur. a Keb 894 in pl. 41. Mich. 29 Car. 2. B. R. in Peeble's Case.—Gilb. Treat. of Ten. 17, 141, cites S. C. that C. pray'd to be admitted, and his copy was cum acciderit post mort. surrendere. vel forisfac. of the woman & and it was the opinion of the justices. that he ought not to be admitted; but the lord may retain it in his hands as an occupant. The reason is, because the interest of the feme was concerned, who had not surrendered; but there was it further in the case, that baron and feme would have released their right to the reversioner, but the lord would not hold a court for it; but it was decreed in chancery, that he should either hold a court or quit the possession.

Cro. C. 204. pl. 10 King against Lorde, & C. 3. If a copyholder for life surrenders into the hands of the lord, to the use of J. S. as after follows, and the lord grants it after to J. S. to have to him for his life, and J. S. is admitted

mitted accordingly, and after dies, in this case *this shall not revert* to the first copyholder for life, for he hath wholly dismissed himself by the surrender, and therefore the lord shall have it. Mich. 7 Car. in camera * scaccarii, between King and Loder, adjudged in a writ of error; and the judgment in B. R. which was there given accordingly per curiam, upon argument at the bar, was now affirmed per cur. præter Hutton, who inclined e contra, and Vernon, who doubted thereof.] adjudged in B. R. for in such case of a surrender by tenant for life, the surrenderee is merely in by the lord, and not by the copyholder who surrendered. — But if a copyholder in fee surrenders to use of another for life, who is admitted, he is in quasi by the copyholder, and upon his death the copyholder shall have it again; and says, that the judgment in B. R. was affirmed by all the justices of C. B. and barons of the Exchequer. Ibid. — Same diversity taken, Arg. Poph. 39 Hill. 36 Eliz. in case of Bullock and Dibler. — Jo. 229. pl. 3. S. C. adjudged. — S. C. cited by North Ch. J. Mod. 200. pl. 31. Pasch. 27 Car. 2. C. B. says this is to be understood of copyholders in such manors where the custom warrants only customary estates for life, and is not applicable to copyholds granted for life with a remainder in fee. — Freem. Rep. 192. pl. 196. S. P. by North Ch. J. accordingly. — Gilb. Treat. of Ten. 240. cites the case of King v. Loder. That if there be a copyholder for life, and he surrenders to the use of another for life, who is accordingly admitted, and then dies, yet the surrenderor shall not be admitted again; for by the surrender he passed away all his estate, and had no interest left in him. If the surrenderor had died, it seems that the estate of tenant for life was not ended, for then the lord would have two deaths to depend upon, either of which would bring him to the estate, and yet but one person that had an interest.

(Q.) Where the Estate granted shall be subject to the Incumbrance &c. of the Lord.

1. LORD and copyholder for life; the lord grants a rent-charge out of the manor whereof the copyhold is parcel; the copyholder surrendreth to the use of A. who is admitted, he shall not hold the land charged. 4 Le. 118. pl. 236. cites it as adjudged 10 Eliz. C. B.

2. If there be tenant by the curtesy, or for life or years of a manor, and a copyhold comes to his hands by forfeiture or determination, and afterwards he binds himself in a statute, and then demises the copyhold land again, this copyhold shall be liable to the statute, because it was once annexed to the freehold of the lord, and bound in his hands. Mo. 94. pl. 233. Pasch. 12 Eliz. Anon.

3. Lord and copyholder for life; the lord grants a rent out of his manor whereof the copyhold is parcel, the copyholder surrenders to the use of A. who is admitted accordingly, he shall not hold it charged; but if the copyholder dies, so that his estate is determined, and the lord grants to a stranger de novo to hold the said lands by copy, this new tenant shall hold the land charged; and so was it ruled and adjudged in C. B. Le. 4. pl. 8. Mich. 25 & 26. Eliz. Anon. cites it as adjudged 10 Eliz. Supplement to Co. Comp. Cop. 87. f. 21. cites S. C.

4. In a replevin; the case was, that Henry, Earl of Westmorland, was seised of the manor of Kennington in fee, and granted a rent-charge to Wm. Cordell, afterwards Master of the Rolls, for life, and afterwards a feoffment thereof to Sir John Clifton, who granted a copyhold to Sands for life, according to the custom of the said manor, the same being an ancient copyhold. Sir John died seised; the rent is behind; Sir William Cordell Supplement to Co. Comp. Cop. 87. f. 21. cites S. C. — But quære that case, and vide Hill. 18 Eliz. C. B.

the Earl of Westmorland's Case; for there the case was, that the demerits of a manor were usually let for lives by copy, and the lord granted a rent-charge to J. D. pro concilio impendendo for life, and afterwards conveyed the manor to J. N. in tail. The rent was behind, and the grantee of the rent died, and the executors of the grantee distrained for the arrearages; and there it was adjudged, that the copyholder should hold the lands charged, Supplement to Co. Comp. Cop. 87. f. 130. cites 3 Le. 59. Hill. 18 Eliz. C. B. Earl of Westmorland's Case.—2 Le. 152. pl. 185. the executors of Cordel v. Clifton. S. C. in totidem verbis.—3 Le. 59. S. C. in totidem verbis.—Gilb. Treat. of Ten. 174. cites S. C. of Sands v. Hempston, and says, that that opinion, as it seems, was upon the first hearing of the cause, for the very case is reported quite contrary by the same reporter; and it is said to be resolved by all the judges but Fenaer, that the copyhold should be charged with the rent-charge, for the custom is no part of his title, but only appoints how he shall hold; and since it was charged in the lord's hands, it is plainly within the intent and meaning of the act, as well as the words to be charged in the copyholder's hands, and to this purpose there is a case in Dyer adjudged; but if the case were adjudged, that the lands should not be charged in the copyholder's hands, on that reason, that he doth not claim only by and from &c. but by custom, yet that would never warrant so general a conclusion, that the statute 32 H. 8. cap. 37. in no other part should extend to copyholds, and that if a rent were granted out of a copyhold in fee, and the grantee died, that his executors should not have debt or distrain; but turn the tables, and if the act of parliament doth in point extend to copyholds, so lands that are claimed by &c. and that which in this case only doth make a doubt is over-ruled, then this is a strong argument, that in other cases where that is not, which occasioned the doubt, the statute shall extend to copyholds, especially since the act was made to remedy an apparent wrong, and doth no harm either to lord or tenant.

5. Lord of a manor, where copyholders are for life, grants a rent charge out of all the manor; a copyhold *escheats*, the lord regrants it by copy; per omnes, nisi Fenner J. he shall not hold it charged, because he comes in above the grant, i. e. by the custom; the same law of *statutes, recognizances, dowers*; but the 10 Eliz. D. 270. per tot. cur. he shall hold it charged, but 2 Brownl. 208. 5 Jac. C. B. in Case of Sammer v. Force, says that this has been denied in Case of Swain v. Becket.

6. It seemed to Coke Ch. J. that if a copyholder be of 20 acres, and the lord grants rent out of those 20 acres in the tenure and occupation of the copyholder and names him, there if this copyhold *escheats*, and he granted again, the copyholder shall hold it charged; for that it is now charged by express words. 2 Brownl. 208. Trin. 5 Jac. C. B. in Case of Sammer v. Force.

Gilb. Treat. of Ten. 189. cites S. P. as said by Lord Coke, but says Moor. 7. If the lord of a manor acknowledges a statute, and then grants lands by copy, and afterwards the manor is delivered to the cognizee in extent, the grant cannot by this be impeached. Co. Comp. Cop. 47. f. 34.

[Mo. 94. pl. 333. Pasch. 12. Eliz. Anon.] is against this, and that there are cases where the grant of a rent-charge, in such case, shall bind the copyholder: but there is some difference between the 2 cases, for in case of a rent, the land were only chargeable, and before the actual charge, where granted over; (vide Mo. 811.) and therefore may be compared to case where a man makes voluntary grants, his wife shall not be endowed of those lands, because the copy-

holder is in by the custom, which was long before the *title of dower* accrued to the woman. It seems the reason of this case is, because the woman had no title of dower to those copyhold lands while they were in the hands of copyholders, and the custom warrants the granting them again, since they have been always grantable by copy, and the estate would be destroyed if she were dowerable of them; quære of the case of the statute^o; but if the heir before assignment of dower grants lands by copy, then it seems she may avoid that; for she had then a perfect title of dower to those lands.

* Co. Comp. Cop. 47. l. 34. S. P.

8. Those *things which take the essence by the lord's grant and interest have no longer continuance than his interest has*, and therefore if the lord, tenant for life of a manor, licences the copyholder to alien, and dies, the licence is gone. Gilb. Treat. of Ten. 190.

9. Grants made after alienation in mortmain, and before the entry of the lord, are good. Gilb. Treat. of Ten. 190.

10. The king grants a manor in fee-farm; the lands and goods of copyholders are not liable to the rent, because they come in by prescription, which is before the rent. Gilb. Treat. of Ten. 310.

[R] What Act or Thing will hinder, or destroy ^[31]
the Power to grant by Copy. This in Roll
is letter (B)
in fol. 498.

[1.] IF the king be seised of a manor, of which Black-Acre is ^{See tit. pre-}
parcel, and demisable by copy in fee, and this comes to ^{rogative (G.}
the king either by escheat or surrender, and after the king leases ^{a) pl. 3. 4.}
the said Black-Acre to J. S. for life, not taking notice that it ^{Cremer v.}
was demisable by copy, this is a good grant, though the ^{Burnet, and}
king did not know that it was demisable by copy, and by ^{the notes}
consequence it will destroy the power to grant it by copy at ^{there.}
any time after, so that the king, or any other lord of the
manor, cannot grant it by copy after. M. 15 Car. B. R. be-
tween Douncliffe and Minors, per curiam, resolved upon evi-
dence at the bar, but they directed the jury to find a special
verdict, and the jury gave a general verdict against their di-
rection.]

[2. If a copyhold in fee comes to that lord by escheat or surrender, And so may
yet there is no impediment, but the lord may after grant it ^{the steward}
again by copy. M. 15 Car. B. R. between Douncliffe and ^{ex officio}
Minors, per curiam, upon evidence at the bar.] ^{where it es-}
^{cheats to the}
^{queen by}

attainder of felony, and that without any special warrant; for it is warranted by the custom, and the queen, her heirs and successors are bound by it; but he ought in duty to inform the lord treasurer &c. for his better direction. 4 Rep. 30. a. pl. 2. Trin. 41 Eliz. B. R. the 2d resolution in the case of Harris v. Jaya. — Cro. E. 699. pl. 13. S. C. adjudged. — If a copyhold escheats to the lord, and he keeps it several years in his hands, during this time it is not demised but demisable; for the lord has power to demise it again. Co. Litt. 58. b. — 4 Rep. 31. pl. 24 Mich. 28 & 29 Eliz. B. R. in French's Case, S. P. and so if he leases at will only. — Gilb. Treat. of Ten. 208, 209, S. P. — S. P. agreed by the justices, 3 Le. 108. pl. 158. Trin. 26 Eliz. B. R. in case of Taverner v. Cromwell. — Co. Comp. Cop. 66. f. 62. S. P.

[3. [But] if a copyhold comes into the hands of the lord S. P. 4 Rep.
in fee by escheat or surrender, and the lord leases it by parcel for ^{31. a. pl. 24}
one ^{Mich. 18 &}

19 Eliz. B. one year, or half an year, or *for any certain time*, it can never be granted by copy after, but this power to grant by copy is wholly destroyed. M. 15 Car. B. R. between *Douncliffe* and the lord *Miners*, per curiam, upon evidence at the bar resolved.] grants away estate by deed, it is an extinguishment. Co. Comp. Cop. 66. f. 62. S. P. — *Gilb. Treat. of Ten.* 208. S. P. because during those estates it was not demisable by Copy.

Supplement to Co. Comp. 82. f. 16. S. P. — *Gilb. Treat. of Ten.* 209. cites S. C. and says, that so it seems if the disseisor had made a scottment in fee.

4. A *tortious interruption*, as if the lord is disseised, and the disseisor dies seised, or if the land be recovered by false verdict, or erroneous judgment against the lord, though during the recovery, or before the judgment reversed, the land was not demised or demisable, yet after recontinuance it is grantable again by copy. 4 Rep. 31. a. pl. 24. Mich. 18 & 19 Eliz. B. R. in French's Case.

Co. Comp. Cop. 66. f. 62. S. P. — Supplement to Co. Comp. Cop. 82. f. 16. S. P. — *Gilb. Treat. of Ten.* 209. S. P. and cites S. C.

5. If land *forfeited or escheated is extended* upon a statute, or recognizance acknowledged by the lord before any new grant made, or if the feme of the lord in writ of *dower* has this land assigned to her, though these impediments are *actions in law*, yet in as much as these are *lawful interruptions*, the land can never be granted again by copy. 4 Rep. 31. a. pl. 24. Mich. 18 & 19 Eliz. B. R. in French's Case.

[32] 6. A copyholder in fee married the *seignior's*, and after they suffered a *common recovery*, which was to the use of themselves for life, remainder over; held per 3 J. that the copyhold was extinct, for by the recovery the baron had gained an estate of freehold. But all held that the *intermarriage only suspended it*. Cro. E. 7. Trin. 24 Eliz. B. R. Anon.

7. Tenant by copy in possession released to the grantee of the freehold of the copyhold all his right in the land; per Anderson Ch. J. this does not extinguish the copyhold. Cro. E. 21. Trin. 25 Eliz. C. B. Anon.

8. Baron seised of a manor in *jure uxoris* leases a copyhold, parcel thereof, for years by indenture, and dies, this destroys not the custom as to the feme, but that after the death of her baron she may demise it by copy as before; so of tenant for life of a manor, if he lets a copyhold, parcel of the manor for years, and dies, it shall not destroy the custom as to him in reversion; per Popham and Fenner justices upon evidence. Cro. E. 459. (bis) pl. 7. Pasch. 38 Eliz. B. R. Conington v. Rusky.

9 Roll 271. pl. 1. 2. S. C. by name of Rusley v. Conington. — The same of tenant in tail of such manor. a roll 271. pl. 3. P. 38 Eliz. B. R. per cur. — So of a bishop, or of the king, or of a tenant of years of a manor, a Roll 197. Prærogative, (G. c) p. 3. — So of an infant *ibid.* — *Gilb. Treat. of Ten.* 283. cites S. C. and says, that by the same reason it seems that the heir may demise it again by copy; and so if a tenant for life of a manor leases a copyhold, parcel of the manor, for years, and dies, this shall not destroy the custom as to him in reversion.

9. If a copyhold *escheats*, and the lord makes a *feoffment in fee on condition*, and enters for the condition broken, it shall never be copyhold again, because the custom or prescription (which was the cause of the tenure and supported it) is interrupted, and that being once broken is become remediless. C. L. 202. h.

Co. Comp. Cop. 66. l. 6a. S. P.—S. P. 4 Rep. 31. in French's Case.—Gilb. Treat. of Ten. 208.

S. P.—But if he grants *estate for life only* he may afterwards grant the fee by copy, according to the custom. [But it seems it is meant of a grant for life by copy.] Le. 56. pl. 70 Pasch. 29 Eliz. B. R. in case of Kemp v. Carter. — So if copyhold *escheats* to the lord, and he alienes the manor by fine, feoffment, or otherwise, his alienee may regrant the land by copy, for it was always demised or demisable. 4 Rep. 31. b. pl. 24 Mich. 18 & 19 Eliz. B. R. in French's Case. — But if the lord keeps the land in his hands for a long time, he or his heirs or assigns may regrant it by copy at his pleasure. Ibid. 31. a.

10. A bishop or tenant in tail &c. lets copyhold lands by deed *indentured*; the issue or successor may grant this by copy again, yet they may make leases according to the statute to bind. Gilb. Treat. of Ten. 311.

See tit. Prerogative (G. c.) pl. 2, 3, and the notes there.

11. Copyholds must be always demised or demisable, Arg. Hard. 98. cites D. 30.

4 Rep. 31. French's Case.

12. If a lease for years be granted of the copyhold itself by *dominus pro tempore*, or for half a year, it destroys the copyhold. Cro. C. 521. pl. 22 Mich. 14 Car. B. R. in Case of Lee v. Boothby.

Adjudged that if the lord makes lease for years, or for life, or other

estate by deed, or without, it can never be granted again by copy. 4 Rep. 31 French's Case. — And by the same reason a *release* upon that lease will pass the freehold and inheritance to him. Gilb. Treat. of Ten. 209.

13. If a lease be made of the manor, and of a copyhold by *express name*, yet this will not extinguish the copyhold, though it was before the lease surrendered to the lord, for when he leases the manor it is included as a parcel of the manor, and the naming the copyhold is *surplusage*, and it remains always as parcel, and is demisable by copy as it was before. Cro. C. 521. pl. 22. Mich. 14 Car. B. R. Lee v. Boothby.

Jo. 449. S. C. but that is of a grant by letters patents and held that it destroyed [33] the power of granting

Gilb. Treat. of Ten. 209. cites S. C. — Co Comp. Cop. 65. l. 6a. S. P.

14. But if he, though he had been but *dominus pro tempore*, or for half a year (though by parol) had made a lease for years of the copyhold itself, it had destroyed the copyhold, for it was then during the time severed from the manor, and so could never afterwards be demisable again by copy. Cro. C. 521. pl. 22. Mich. 14 Car. B. R. Lee v. Boothby.

On Lee and Boothby's Case it was said by Hale Ch. J. that a lease for years of lands that are copy-

hold, particularly without taking notice it was copyhold, is good for the rest of the copyholder, and after the lease spent, the inheritance takes place and severs the copyhold from being granted by copy after during the lease, but when that is spent it is parcel again, which was agreed in evidence to the jury at bar, in an ejectment on Sir George Sandy's patent, and verdict for the defendant. 3 Keb. 91. pl. 33. Mich. 14 Car. 2. B. R. Cholmley v. Cooper and Ward.

15. If a copyholder purchases the manor, he may grant the copyhold again; but if he puts the copyhold from the freehold it

is gone. Cart. 24. Pasch. 17 Car. 2. C. B. per Bridgman Ch. J. in delivering the resolution of the Court, in Case of Taylor v. Shaw.

16. If *copyholder surrenders* to the lord *without declaring any use*, the copyhold extinguishes, as on a surrender by tenant for life to him in reversion; per Holt Ch. J. Wms's. Rep. 17. Hill. 1700.

17. The custom of a manor was to grant for 3 *lives habend. successive sicut nominantur*; a grant is made to A. B. and C. A. purchases the manor, and the question was, whether there being a custom giving power to frustrate the 2 remainders by surrender A. by his purchase had extinguished them? but held to be no *merger* or *extinguishment* of the estate between the custom of *destroying the remainders* is confined to the formality of a *surrender*, and the purchase of the manor, though it be between the parties a surrender, yet it shall not be construed as such to other purposes, viz. to destroy the remainders; per cur. 6, Mod. 67. Mich. 2 Ann. B. R. in Case of Smartle v. Penhallow,

(S) Grant &c. How; Where the Inheritance is severed from the Manor. How it shall be, and what shall be done.

1. IF the lord of a copyhold manor makes a feoffment of a parcel of his manor which is holden by *copy for life*, and afterwards the *copyholder dies*, though now the lord has not any court, yet the *feoffee may grant over* the land *by copy again*; per Ayliff J. Le. 289. pl. 394. Trin. 26 Eliz. in Lord Dacres's Case.

S. C. cited
Gibb. Treat.
of Ten. 194.
196.

2. Where the inheritance of a copyhold is severed from the manor, as by being granted to a stranger, the copyholder cannot *surrender or devise* the same, but that it *shall descend to his heir*; for such surrender after the severance of the inheritance from the copyhold is void, because the lands were not parcel at the time of the surrender, and a devise only cannot transfer such customary estate; for there can be no transferring but by surrender into the hands of the lord according to the manor. 4 Rep. 24. b. pl. 10. Mich. 33 & 34 Eliz. B. R. Murrel v. Smith.

Cro. E. 252.
pl. 20. S. C.
[34]
& S. P.
held, and
Fenner J.
said, that
he might
surrender
his estate to

4. After the severance the copyholder *shall pay his rent to the feoffee*, and shall pay and do all other *services* which are due without admittance or holding of any court, as plowing the demesnes of the lord, heriot &c. But suit of court, and fine on alienation or admittance are gone; for now the land or tenement may be aliened; for as the copyholder has some benefit by his severance as appears before, so has he great prejudice, for now he * cannot surrender or alien his estate

* He may surrender to the grantee of the freehold to the use of the grantee; per Fenner J. Cro. E. 252. pl. 20. S. C. & S. P.—Ibid. 499. S. P. by Popham and Clench.

because

because he cannot alien it but by *surrender in manus domini serviciorum* as the custom has warranted, and this he cannot do, nor the feoffee cannot make admittance or grant of the copyhold, for he is not dominus pro tempore. Ibid. 25. a.

4. But it was resolved, that such *forfeitures* as were forfeitures *before the severance*, as making of feoffment or lease, waste, denying of rent &c. are forfeitures also after severance; so if the land was of the nature of Borough English or Gavelkind before the same custom, all other *customs which run with the land shall remain after severance*. Ibid. 25. a.

nor the grantee cannot grant it by copy to another, so that the copyholder must always keep it in his hands; but quere of this; and the other justices gave no opinion of this point. — Ibid. says the court held, that though the heir may enter without admittance, yet he shall pay his usual fine, and do all his services, except suit at court. — Gilb. Treat. of Ten. 196. cites S. C. of Cro. as to the fine, and asks how that can be when there is no admittance? — 4 L. 230. S. P. but held, that Heriots, and such other casualties, are gone. Bell v. Langley.

5. If such copyholder will *alien*, it must be by decree in *chancery* against him and his heirs, but by this the interest of the land is not bound, but the person only. 4 Rep. 25. Murrell v. Smith.

it is, if the land were of the nature of Borough-English it still remains so; and there is no way for such a copyholder to alien but by decree in Chancery against him and his heirs.

6. If the lord grants a copyhold, and after severs this copyhold from the manor, by granting the inheritance to a stranger, though now one of the chief pillars of a copyhold estate is wanting, viz. to be parcel of the manor, yet because the land at the time of the copyholder's admittance had this necessary incident, *this severance, being a matter ex post facto, cannot amount to the destruction of the copyhold, especially being the sole act of the lord himself*. Co. Comp. Cop. 46. l. 34.

(T) Decrees in Equity as to the Heads foregoing relating to Grants of Copyholds.

1. **T**HE father settled a manor, reserving only an estate to himself for life, remainder in tail to his son, he after marries a second wife, and settles part of the same manor on her, and then died, she surviving who enjoyed it for the greatest part of her life, during which time she granted several copyhold estates to the tenants, who enjoyed the same under such grants, and particularly a copyhold estate to one A. for his life, and after his death she granted the reversion to the plaintiff. Not long before her death she son, as tenant in tail, brought an ejectment against her, but confirmed the estates which she had granted to the tenants by signing their copies, but refused to admit the plaintiff upon the grant of the reversion. Decreed, that in regard A. had enjoyed it all his life-time, and that the defendant, the son, had confirmed the estates of the other

tenants, the plaintiff should be admitted, and hold his estate likewise, according to the grant made by the widow, N, Ch. R. 32. Lippiat v. Nevill.

2. A. possessed of copyhold lands for one life in possession, and three lives in reversion, died, leaving E, his only daughter, who was the only survivor, and married J. S. who contracted with the *bishop of W. lord of the manor, after the restoration*, for two lives in reversion for 40l. and was admitted and held the same after his death for several years, *This manor in the rebellion was granted to Corbet, and Corbet's widow now pretends a right and says that Bishop Thornbury (the bishop before the rebellion) granted the premises for three lives in reversion after E's death to W. R. one of whom has lately obtained a verdict in ejectment, but J. S. suggests, that W. R.'s copy (if any such was) was surrendered by letter of attorney, at a court held by Corbet, in the late usurpation, and a new estate granted for lives in reversion who are since dead, but that defendants having got the court rolls, letter of attorney, and surrender, do conceal the same; the Court directed a new trial, and the defendants to produce the letter of attorney and surrender made by W. R. and the injunction to continue to quiet the plaintiff's possession till trial had, and the plaintiff to give security to be approved by the Master to answer the mesne profits to Corbet's widow, in case the verdict should go against him.* Fin. R. 41. Mich. 25 Car. 2. Pitt, v. Corbet & al.

Fin. R. 80.
S. C.

3. *A. seized of a copyhold in the manor of D. sells to B. B. purchases the manor, and by a particular in which this copyhold was not included, B. sells the manor to C. the copyhold was 25l. per ann. and C. never claimed it in six years, but then claimed it and recovered at law, it passing as part of the manor; per Lord K. though the particular given in by B. to C. was much beyond the value; yet since C. neither treated for this copyhold, and other small parcels for 20l. 10s. &c. value &c. as in B's particular and conveyance, this 25l. per ann. would not have been omitted if C. intended to buy it, or B. to sell it, and decreed for B. but B. to pay the rent arrear, and for the future hold it in all respects so as copyhold subject to forfeiture, and uncertain fine &c. as it was before the regrant to him by copy &c.* 2 Chan. Cases 194. Pasch. 26 Car. 2. Taylor v. Beversham.

Jeffries C. seemed to make little doubt but that the copyhold was merged though it was said this point was depending on a special verdict at law. Vern. 458. Parker v. Turner.

4. A. tenant by copy to him and the *heirs males of his body purchased the fee-simple* to him and his heirs, and afterwards for a valuable consideration, viz. 300l. sold to B. who was in possession several years, and died, leaving C. a son. Ld. Chancellor thought the conveyance good against the heir; for the copyhold being severed from the manor, there is no means to bar it but by conveyance at common law; the entail is not within the statute of W. 2. but Ld. Chancellor took time to advise. 2 Chan. Cases 174. Hil. Jac. 2. Barker v. Turner.

(U) Sur-

(U) Surrender. What it is, and how considered.

1. A Surrender is a thing executory, which is executed by the subsequent admittance, and nothing at all is invested in the grantee before the lord has admitted him according to the surrender, and therefore if at the time of the admittance the grantee be in rerum natura, and able to take, that will serve. Co. Comp. Cop. 50. f. 35.

2. This word (Surrender) is *vocabulum artis*, and therefore where a surrender is needful, if this one word be wanting, all other words used in ordinary conveyances are ineffectual and insufficient to convey any copyhold estate; for if a copyholder comes into court, and offers to pass his copyhold by word of grant, of gift, of bargain or sale, or such like, I doubt he will fail of his purpose, for as he is tied to a singular form of assurance, so is he restrained to particular words in his assurance. Co. Comp. Cop. 51. f. 39.

[36]
Gilb. Treat.
of Ten. 294.
cites this
saying of
Lord Coke;
but seems
contra.

3. A surrender (where by a subsequent admittance the grant is to receive his perfection and confirmation) is rather a manifesting the grantor's intention, than of passing away any interest in the possession, for till admittance the lord takes notice of the grantor as tenant, and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord; but yet the interest is in him, but *secundum quid*, and not absolutely; for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender, neither in the grantee is any manner of interest invested before admittance: for if he enters he is a trespassor, and punishable in trespass, and if he surrenders to the use of another, this surrender is merely void, and by no matter *ex post facto* can be confirmed; for though the first surrender can be executed before the second, so that at the time of the admittance of him to whose use the second surrender was made, his surrenderor has a sufficient interest as absolute owner; yet because at the time of the surrender he had but a possibility of an interest, therefore the subsequent admittance cannot make this act good which was void *ab initio*. But though the grantee has but a possibility upon the surrender, yet this is such a possibility as is accompanied with a certainty, for the grantee cannot possibly be deluded or defrauded of the effect of his surrender, and the fruits of his grant, for if the lord refuse to admit him, he is compellable to do it by a subpoena in chancery, and the grantor's hands are ever bound from the disposing of the land any other way, and his mouth ever stopped from revoking or countermanding his surrender. Co. Comp. Cop. 51. f. 39.

4. Surrender is but in nature of a deed-pole rather than an indenture, and enures by way of limitation of use; Arg. Saund. 151. Pasch. 20 Car. 2. in Case of Wade v. Bache.

Surrender of
a possibility
enures by
way of
grant; per
Pannell.

Coke Ch. J. Roll R. 318. in case of Lane v. Pannell.

(W) Copyhold.

This in Roll
is letter (E)
in fol. 499.

(W) Copyhold.
(Surrender.)
At what Time.

Cro. E. 662.
pl. 11. Col-
chin v. Col-
chin, S. C.
and ruled
good.

[1.] If there be *baron and feme copyholders to them and the heirs of the baron*, and the *baron dies*, the *heir of the baron may surrender his reversion* into the hands of two tenants of the manor out of the court, who by the custom have power to take surrenders *before admittance, and during the life of the feme*; and this is a good surrender, for the reversion was cast upon him by descent before any admittance. P. 41. Eliz. B. R. between *Calchin and Calchin*, adjudged.]

2. The *heir before admittance* may surrender to the use of another. 4. Rep. 22. b. the 3d Point in Brown's Case.

[37] 3. After the death of tenant for life *he in remainder may, without any admittance* surrender the same land; for the first admittance was sufficient. 4. Le. 111. pl. 226. in time of Q. Eliz. *Hegger v. Felston*.

4. If a copyholder in fee *surrenders to the use of B. and his heirs, B. before admittance cannot surrender to the use of another*, for before admittance B. had nothing, and his copy, upon which he is admitted, is his evidence by the custom, and before that he is no customary tenant, so he can transfer nothing to another; adjudged, Yelv. 144. 145. Mich. 6. Jac. Wilfon v. Weddal.

S. P. because he is in by course of law, for the custom, which makes him heir to the estate, casts the possessions of his ancestors upon him. Yelv. 145. Mich. 6. Jac. B. R. in case of Wilfon v. Weddal. — 1 Brownl. 143. S. C. adjudged but it seems to be only a translation of Yelv. so where a surrender was to A. for life and after to the use of B. in fee; A. was admitted and died; B. may surrender without any new admittance. 4 Le. 111. pl. 226. in time of Q. Eliz. *Hegger v. Felston*.

This in Roll
is letter (F)
Fol. 500.

[X] Copyhold.
Surrender.
At what Place.

In 17 Eliz. C. B. it was said by Dyer and Moun-
son, that
[1.] A Copyholder may surrender *into the bands of the lord of court*, without a particular custom to warrant it. Co. Lit. 59. a. b. contra Co. 9. 76. b.]
without a prescription a surrender of copyhold land could not be out of court, nor an admittance out of court, neither to the lord himself nor to his steward, but in divers places it is used by custom so to be, and thereupon the doing of fealty, and the paying of the lord's fine, shall be presented by the homage to be done at the next court, and all these things they said are to be done by the custom, and in that case it was said by the Lord Dyer, that a surrender out of court might be to the lord himself, to go by way of extinguishment. Supplement to Co. Comp. Cop. 69. f. g.

[2. But

[2. But he cannot surrender to the lord into the hands of tenants, or the reeve, or others out of court, without a particular custom. Co. Lit. 59.]

the manor, surrender his copyhold lands into the hands of two tenants, but the surrender was to the use of J. S. to take effect immediately after his death. In this case it was resolved, that as unto the surrender into the hands of two tenants, that might be good, although it was out of court, by custom. Co. Comp. Cop. 65. f. 3.

[3. The steward of the manor may take a surrender of a copyhold out of the manor. Mich. 13 Jac. B. R. between *Hausego and Wild*, per curiam.]

only. 4 Rep. 30. b. pl. 21. Holcroft's Case. — Le. 227. pl. 309. Blagrave v. Wood, S. C. Pasch. 33 Eliz. C. B. sed adjournatur. — But held per tot. cur. contra Godb. 148. pl. 175. Trin. 31 Eliz. C. B. Blagrove v. Wood. — Ld. Raym. Rep. 76. Pasch. 8. W. 3. Tukeley v. Hawkins, resolved that a steward of a manor may take a surrender of a copyhold out of the manor, but cannot admit out of the manor, and that a custom that the steward shall not take surrenders out of the manor is a void custom. — Ld. Raym. Rep. 159. S. C. cited by Powell J. and said, that a steward by parol cannot take surrender out of court.

4. Steward of a manor made a commission to one to take a surrender in Ireland of a copyholder who was there, and it was holden a good surrender; cited by Manwood. 4. Le. 111. pl. 226. in time of Q. Eliz. [38]

5. The steward of the court of a manor in Ireland being in England, sent a writ in the nature of a *dedimus potestatem* to one who was in Ireland, to take a surrender there of copyhold lands; and the opinion of the judges here, to whom the case was referred to advise, and certify their opinion, was, that such a surrender taken by *dedimus* was good enough; but note, that in such case it must be intended, that such giving power to take a surrender, if it be to be done, it must be alledged to be done either by prescription or custom; for that surrenders generally taken out of court must be by custom. Supplement to Co. Comp. Cop. 68. f. 3.

6. Baron and feme copyholders in right of the feme surrender out of court into the hands of the steward, and she was examined by him. Though in an ejectment brought it was not proved, that he was steward by patent, nor that there was any special custom to warrant it, yet it was resolved per tot. cur. to be good; and Mountague said he had known it so adjudged. Cro. J. 526. pl. 2. Pasch. 17 Jac. B. R. Smithson v. Cage.

7. Where a steward of a manor has a power to make a deputy, and he makes B. his deputy, and B. by writing under his hand and seal makes C. and D. his deputies, jointly and severally to take a particular surrender only, D. took the surrender out of court to the use of the surrenderors will. Per tot. cur. this is a good surrender. Ld. Raym. Rep. 658. Pasch. 13 W. 3. B. R. Parker v. Kett.

8. Steward of a copyhold manor may without custom take surrenders out of court, for he has the power of the lord, and the lord may do it; & per tot. cur. there is as much reason that the steward should take surrenders out of the manor as the lord,

A copyholder in fee did, according to the custom of

S.P. accordingly, though he was retained by parol

2 Roll Rep. 327. S. C. but D. P.

Comyns's Rep. 84. 85. pl. 52. S. C. resolved, that the surrender was good. — See tit. Steward of Courts (K) pl. 1.

lord, and that he should *do it out of the manor as out of the court.* 1 Salk. 18. pl. 4. Trin. 1 W. & M. C. B. Dudfeild v. Andrews.

This in Roll
is letter (E)
pl. 2. in fol.
499. 500.

[Y] [Where there are *several Surrenders of the same Lands* to different Uses. Which shall take Place; and how.]

Lane 99.
Gooch's
Calc. seems
to be S. C.
& S. P. ad-
mitted.

[1.] IF a copyholder in fee surrenders into the hands of certain customary tenants to the use of his wife in fee, and after, before any court, the said copyholder surrenders the same lands into the hands of other * customary tenants, to the use of his wife for life, the remainder to another in fee, and at the next court both surrenders are presented, and the steward admits the wife according to the second surrender, this is a good admittance, and the wife shall have it but for life, and so it is a good remainder, H. 8 J2. Scaccario, adjudged.]

This in Roll
is (E) pl. 3.
in fol. 500.

—Cro. C.
pl. 10. S. C.
adjournatur.

—Ibid.
283, 284.

[39]

pl. 27. S. C.
adjudged
according-

ly.—Jo.
306. pl. 17.

S. C. held
according-

ly.—Sup-
plement to

Co. Comp.
Cop. 69. 70.

f. 3. cites
S. C.—

S. C. cited
a Sid. 61.

—Gilb.
Treat. of

Ten. 264.
cites S. C.

says, it seems
this must be

understood
if the money

had not been
paid or a

court had
been held

before the
money was

due, and
there the

surrender
had been

[2.] If a copyholder in fee surrenders out of court into the hands of tenants according to custom, to the use of B. in fee, upon condition, that if he pays 10l. to B. the first of May after, it shall be lawful for him to re-enter, and after, and before payment of the 10l. surrenders into the hands of tenants, to the use of C. in fee, and after, before the said first of May, A. pays the money to B. and after, and before the said day, A. surrenders into the hands of tenants to the use of D. in fee, and the custom of the manor is, that the surrenders made out of court into the hands of tenants shall be void if they are not presented at the next court, and at the next court the surrender to B. is not presented, but the surrender to D. is first presented, and after, at the same court, the surrender to C. is presented; in this case, upon the whole matter, C. shall have the land; for, notwithstanding the surrender to the use of B. upon condition nothing passed out of the copyholder, but the estate remained in him till it is presented at the next court, so that A. had power notwithstanding the surrender to the use of B. to surrender to the use of C. but it was subject to be void if the surrender to B. had been presented; as if a man acknowledges a deed of bargain and sale, and after bargains and sells to another, if the second deed be inrolled, and the first not, the second man shall have the land; so it is of the conusance of a fine; then in this case, the first surrender not being presented, and so void, the second surrender is to be preferred before the third surrender, both being presented at the next court, and the performance or non-performance of the condition is not material in the case, but it is all one as if it had been absolute without any condition. Mich. 8 Car. B. R. between *Burgoign and Spurling*, adjudged per curiam upon a special verdict. Intratur, Trin. 7 Car. Rot. 374.]

presented; for it seems the presentment of the first surrender, after the payment of the money, had

had been void, because the surrender was void then, and a void surrender cannot be presented, and until a surrender be presented, it cannot bind the interest of the land; sed quare.—S. C. cited Arg. Pollex. 50.

3. A copyholder in fee surrendered to the use of himself for life, the remainder to J. his son for life, the remainder to the use of his last will, and the admittance was secundum formam redditionis prædict. J. dies, afterward the father surrenders to the use of the defendant, and died, without making a will. It was the opinion of the justices, that by the second surrender it passed to the defendant, and it is as a feoffment at this day to the use of his will, for it is to the use of himself, because he might dispose of it by his act in his life-time, and so he might do in this case. Cro. E. 441. pl. 4. Mich. 37 & 38 Eliz. B. R. Fitch. v. Hockley.

4 Rep. 23. a. pl. 6. S. C. adjudged, that the fee-simple of the copyhold being limited to the use of his will, remained in the copyholder, and not in the lord.—

Gilb. Treat.

of Ten. 182. cites S. C. for all the design of the surrenderor was, that he might dispose of it by will, not to vest the interest in any body, or to give away the power of disposing of it.

4. A. being seised of a copyhold in fee, surrendered to the use of his wife by the hands of 2 tenants, according to the custom, and afterwards surrendered the same land into the hands of 2 other tenants to the use of his wife for life, remainder to J. S. in fee; both surrenders were presented at the next court; the steward admitted the wife upon the second surrender; it seems to be admitted, that it was good. Lane 99 Hill. 8 Jac. in the Exchequer, Gooche's Case.

1 Roll Abr. 499. pl. 2. reports the first surrender to be made to the wife in fee, and says, it was a good admittance, and the wife should have Hill. 8 Jac.

for life, and the remainder should be to J. S. and that it was adjudged. in Scacc.

[Z] What Act shall be said a Surrender in Law.

[40] This in Roll is letter (L) in fol. 501.

[1.] IF a copyholder in fee takes the same land from the lord by another copy for life, this is not any surrender or determination of his copyhold of inheritance; for a copyhold cannot be surrendered but by actual surrender in court, this is sursum reddens into the hands of the lord, and not by surrender in law. Mich. 37. El. B. between *Shepherd and Adams*; which intratur Hill. 36 El. Rot. 2640; adjudged. Quod vide M. 13 Ja. * B. R. same Case, and there it is admitted a surrender; but there said, the reversion is in the surrenderor, no disposition being made thereof.]

* S. C. cited 3 Bullf. 81. as adjudged upon a demurrer, that this latter acceptance was a giving up of his inheritance.—Roll. Rep. 256.

pl. 24. cites S. C. as ad-

judged that it should be no estoppel to claim other estates, and so he should not lose the inheritance; and that the record was brought into court and read, and the reason of the judgment was, for that it was no more than if the copyholder had surrendered to the lord to the use of himself for life, with the remainders over for lives, and so the reversion in fee should continue in himself.—Gilb. Treat. of Ten. 298. cites S. C. that if copyholder in fee come into court, and there accepts a copy to himself for life, remainder to his wife for life, remainder to his son for life, this is tantamount to a surrender to the use of himself &c. but he hath his old reversion in him, for there is no ground to make a surrender of that by construction, because he has made no disposition of it; but as this case is in Roll, it is said that it was no surrender, for that a copyhold cannot be surrendered by a surrender in law, but only by actual surrender, yet

as it is in other places in Roll, it is as in Bulfrode, held to be a surrender, but that the reversion was still in the copyholder.

† Roll. Rep. 256. pl. 24 Mich. 13. Jac. B. R. Southcott v. Adams, S. C. a copyholder in fee came into court, and accepted by copy of the lord an estate for his life, remainder to his wife for life, remainder to his son for life. Haughton thought that this was a surrender of the inheritance, but Doderidge e contra, and held that the reversion in fee continued in him; but as to this point the court directed the jury to find a special verdict, but they being ready to give a general verdict, the plaintiff was nonsuited.—3 Bulst. 80. Belfield v. Adams, S. C. accordingly.—Supplement to Co. Comp. Cop. 68. f. 2. cites S. C.—If the acceptance had been only of an estate for life to himself who had the fee, there might be some question, whether this should not conclude him of the inheritance; per Doderidge J. Roll. Rep. 256.

Gilb. Treat. of Ten. 237. S. P. — [2. [So] If a copyholder in fee comes into court, and says, that he renounces his copy, this is not any surrender. M. 37. El. B. in the said case held.]

Saying to the lord, that he will hold the land no longer by copy but by bill, on which the lord makes him a bill, which tenant accepts, per tot. cur. it is a determination of copyhold. And 199. pl. 235. Coleman v. Bedill.—Le. 199. pl. 273. Mich. 31 & 32 Eliz. C. B. Coleman v. Portman, S. C. held clearly a good surrender.—Gilb. Treat. of Ten. 289. cites S. C.

3. M. seised of the manor of D. became bound in a statute to A. who died. The executors of A. sued execution against M. Upon the extendi facias a liberate issued, and thereupon the manor was delivered to the executors, but was not returned. M. commanded a court baron to be held, and was held accordingly by sufferance of the executors, who were present at the time, and in M's presence they said, viz. we have nothing to do with this manor; per Wray Ch. J. this is no surrender; for the words are not addressed to M. the conusor who is capable of a surrender, nor to any person certain; and this is but a general speech. Le. 279. pl. 378. Hill. 28 Eliz. B. R. Penruddock v. Newman.

[41]
Supplement to Co. Comp. Cop. 68. f. 2. cites S. C. that this was a good surrender, and a good estate thereupon vested in the wife for her life. —Gilb. Treat. of Ten. 237, 238. cites S. C. and says, that the communication in this case seems to have been that which caused the surrender, for nothing else could; and for aught appears this communication was out of court; the acceptance by bill could not be the surrender in this case, for the bill was never made of that, so that it could only be the communication that amounted to a surrender.

4. Lord pretending a forfeiture by a copyholder in fee, the copyholder agrees to pay him 5l. and paid it, in consideration whereof he was to enjoy the copyhold, except a wood, for his life, and his wife's widowhood, and that the tenant should have election whether the lands should be assured to him by copy or by bill &c. The tenant chose to have the land assured to him by bill; the lord enjoyed the wood, and this was held a good surrender for life only, and that the lord had the wood discharged of the customary interest. Le. 191. pl. 273. Mich. 31 & 32 Eliz. C. B. Coleman v. Sir H. Portman.

5. Parol agreement adjudged a surrender; Arg. 2 Show. 131. cites Le. 181.

6. A bargain and sale to the lord is a surrender; Arg. 2 Show. 131. cites Jo. 141.

7. If a copyholder or other customary tenant shall say to his lord, or other persons, *in the court of the manor, I agree to surrender my lands*, these words will not be a present, or an express surrender, nor will they amount to so much as a relinquishing of his estate; for in truth it is not any thing in present but an act to be done in futuro like unto the Case put by Wray Ch. J. A. seised of the manor of D. demiseth the same manor at will, that it is no lease, no more in the other case shall it be a surrender, or a relinquishing his copyhold, or copyhold estate, but yet, notwithstanding, it will be agreed, that in some cases an express and particular agreement made by a copyholder with the lord of the manor, for, or concerning his copyhold lands, will amount to a surrender of the same. Supplement to Co. Comp. Cop. 68. f. 2.

Le. 177,
178, pl. 350.
Trin. 31
Eliz. B. R.
Sweeper v.
Randal, S.
P. and seems
to be S. C.
—Gilb.
Treat. of
Ten. 258.
says, there
can be no
reason why
a surrender
in court
by words
should be of
more vali-

dity than a surrender by words out of court.

8. If a copyholder bargains and sells his land to J. S. and this is found by the homage, and J. S. prays to be admitted tenant, yet the heir of the copyholder shall avoid the admission, because of the insufficiency of the surrender taking by the words of bargain and sale, and not by the words of the surrender; per Lord Dyer. D. 8 Eliz. Calth. Reading. 57.

9. If a copyholder comes into the court, and desires his lord to admit his son to be tenant in his father's place, this seems a good surrender to the use of his son. Calth. Reading. 57, 58.

10. If a copyholder will in the presence of other copyholders of the same manor say, that he is content to surrender his copyhold lands to the use of J. S. this is no good surrender; but if he says he doth surrender into the hands of the lords to the use of J. S. if the lord will thereunto agree, this is a good surrender, whether the lord will or not. Calth. Reading. 58.

11. If the tenant resigns his interest in the court, into the lord's hands, there wisbal for the lord to do his will, this is a good surrender if it be accepted. Calth. Reading. 58.

12. If a copyholder says he will be no longer the lord's tenant, though these words be recorded, yet this is no good surrender. Calth. Reading. 58.

13. If a copyholder for life takes a new estate for life by copy, this is a surrender of his first estate. Calth. Reading. 59.

14. But if a copyholder for life takes a lease of the same by indenture for life, this is not a good surrender of the copyhold; Quære. Calth. Reading. 59. [42]

15. If a copyholder comes to the lord and tells him, that for the preferment of his son in marriage with such a man's daughter, his will is, to give his land presently to his son, and desires the lord that he would be contented therewith, this is no good surrender. Calth. Reading. 59.

16. But

16. But if he said these words in the lord's court, and the same is recorded, or found by homage as a surrender, and so presented; then this had been a good surrender, without any other words of surrender. Calth. Reading. 59.

Gilb. Treat.
of Ten. 294.
S. P. —

Gilb. Treat.
of Ten. 297.
S. P. —

If he says,
that he is
content to
surrender,

this is no surrender, for it only expresses his inclination to do it, but not that he actually does it; and adds a quare, if words spoke out of court will amount to a surrender; but any words spoke in court by a copyholder, shewing his intention to surrender into the lord's hands, amounts to a good surrender. *Ibid.*

Gilb. Treat.
of Ten. 281.
cites S. C. —

Rent was re-
served on a
surrender in
fee, and the
surrenderee
admitted fe-
veral alie-
nations
made of the
land, and
afterwards
the rent

was assigned over, and was so done by surrender and admittance. It was insisted, that though in strictness the rent would not pass in law by surrender, yet the surrender and admittance were evidences of the agreement for the sale, and the plaintiff was a purchaser, and so intitled, and decreed accordingly; per Jefferies C. 2 Vern. 16. pl. 10. Hill. 1686. Spindler v. Wilford.

(A. a) Of what a Surrender may be.

1. **C**OPYHOLDER leased his land for years by licence; and afterwards by deed granted the rent to a stranger, to have during the term &c. The lessee attorned and paid rent to the grantee; per Gaudy J. the grant is good, but now it is but a rent-seck, and it was said by some, that the lessor cannot surrender rent reserved on a lease for years unless he surrenders the reversion also. Le. 315. pl. 441. Pasch. 30 Eliz. B. R. Austin, v. Smith.

2. Though it be incident to the estate of a copyhold to pass by surrenders, yet so forcible is custom, that by it a freehold and inheritance may pass by surrenders (without the leave of the lord) in his court, and delivered over by the bailiff to the feoffee, according to the form of the deed, to be inrolled in the court &c. Co. Lit. 60. b.

3. Copyholder *aliens part*, it seems the lord is compellable in Chancery to accept such surrender. Palm. 342. Hill. 20 Jac. B. R. in Case of Snag. v. Fox.

[43] (B. a) Surrender. To whose Use it may be.

1. **A** Man may surrender to the use of his wife. 4 Reps. 29. b. pl. 18. Mich. 27 & 28 Eliz. in Case of Bunting v. Lepingwell.

And though
it was en-
deavoured
to be
proved, that

2. A surrender to the steward to his own use is good, for the entry is quod sursum-reddidit in manus domini, and the steward is but the lord's servant, and the surrender is to the lord

lord, and not to him. Cro. E. 17. pl. 43. Mich. 41 & 42 Eliz. C. B. Erish v. Reeves.

by the custom of the manor a surrender could

not be made to the steward himself to his own use, the court rejected it, because it was against law. Cro. E. 717. in S. C.—Supplement to Co. Comp. Cop. 67. f. 1. cites S. C.—Gilb. Treat. of Ten. 261. cites S. C.

3. If a surrender be made in court into the hands of the lord or his steward, it must be *to such a person or his use who is in esse, and capable of such a surrender*, or that may take presently by force of the surrender, otherwise such surrender, though it be an actual surrender made in the court of the manor to the lord or steward himself, is not good. Supplement to Co. Comp. Cop. 67. f. 1.

4. If a copyholder in consideration of 20l. to be paid to J. S. does make a surrender of his land to N. R. this surrender is to the use of J. S. because of the consideration expressed in the copy, and not to the use of N. R. *But if in the copy the use be expressed to N. R. and no consideration mentioned*, the use expressed shall stand against any consideration to be averred. Calth. Reading. 37.

[C. a] *By what Persons, and to whom it may be Surrendered.*

This in Roll is letter (O)

Fol. 503.

[1. **T**ENANT for life of a copyhold, where there is a remainder over, may surrender to the lord. Co. 9. Marg. Podger. 107.]

2. If the lord of a manor for the time being be lessee for life or for years, guardian, or any that *has any particular estate*, or tenant at will of a manor (all which are accounted in law domini pro tempore), do take a surrender into his hands; and *before admittance* the lessee for life dies, or the * years interest, or custody do end or determine, or the will is determined, though the lord comes in above the lease for life or for years, the custody or other particular interest or tenancy at will, yet he shall be compelled to made admittance according to the surrender. Co. Lit. 59. b. cites it as held 17 Eliz. in the Earl of Arundel's Case.

Gilb. Treat. of Ten. 267. cites S. C.—* When he is become tenant at sufferance he may take a surrender cited by Doderidge J. as adjudged in B. R. 2. Roll Rep. 181.

3. A tenant for life of a copyhold, remainder over in fee to B. B. may surrender his estate, *if there is no custom to the contrary*; for the estate of tenant for life, and of him in remainder, are but one estate, and the admittance of tenant for life is the admittance of him in remainder; held by the barons. 4 Leon. 9. pl. 38. Mich. 33 Eliz. in Scacc. Butler v. Lightfoot.

2 Le. 239. pl. 329. S. C. in totidem verbis.

4. J. S. was generally retained by the lord of a manor by parcel to be steward of his manor, and to keep his courts, adjudged that such steward may take surrenders of the custom.

[44] Supplement to Co. Comp. Cop. 69 f. 3. cites

S. C. but says *quare*. — See Tit. Steward of Courts (F) pl. 1. and the notes there.

mary tenants out of court; for till he be discharged he is steward of the manor as well by retainer, by parol, as if he had a grant thereof by deed. 4 Rep. 30. b. pl. 21. cited as Holcroft's Case.

5. Any one who may be a good grantor in a deed at common law, may make a good surrender of copyhold land, as any body politick or corporate, felons before attainder, bastards, bereticks, lepers, deaf, dumb, or blind men, being tenants, may surrender a copy; and surrenders made by such who are disabled to make a grant at common law are void, as surrenders by infants, aliens, idiots, such as are born deaf, dumb, and blind, women covert without their husbands. See Co. Comp. Copy. 34, 35.

6. Where the custom of a manor is to surrender to two copyholders out of court, a surrender to the heirs of a copyholder before admittance is good; per Twisden J. the other justices being absent. Keb. 25. pl. 74. Pasch. 13 Car. 2. B. R. in evidence to a jury. Munifas v. Baker.

Lev. 26. Milfax v. Baker S. C. but S. P. does not appear. — Gilb. Treat. of Ten. 271. cites S. P. that it is good.

[D. a] Surrender. By or to Feme Covert, Infant, &c.

Cro. E. 90. f. 17. Knight v. Fortipan, S. C. adjudged. — It is no discontinuance. Gilb. Treat. of Ten. 179. — An infant surrenders copyhold lands, he may at full age disagree and enter; for in case where an infant makes a feoffment in fee, he may enter, much more in case of a surrender; for a feoffment is a conveyance which will work a discontinuance, but a surrender will not. Gilb. Treat. of Ten. 261.

A. Tenant for life, remainder in fee to B. an infant; they both joined in a surrender to J. S. in fee. B. dies. The heir of B. may enter, and is not put to his plaint in nature of a dum fuit infra ætatem. Le. 95. pl. 124. Hill. 30 Eliz. B. R. Knight v. Footman.

2. A surrender by a feme covert made upon examination before two tenants of the manor by especial custom is good. Cro. E. 717. pl. 43. Mich. 41 & 42 Eliz. C. B. Erish v. Reeves.

3. But without especial custom to warrant it, it is not good, because it is a judicial act, proper to be done in court; and Walmsley said it was so adjudged upon demurrer in a Lancashire Case, where such a custom was pleaded and adjudged good. Cro. E. 717. pl. 43. Mich. 41 & 42 Eliz. C. B. Erish v. Reeves.

A tenant out of court cannot take a surrender of a feme covert, for that she is secretly to be examined by the steward; by the opinion of the judges. Toth. 108. cites 38 Eliz. II. A. fol. 420. Rich v. Erth. — Gilb. Treat. of Ten. 295; cites S. C. and says, that an examination of a feme covert by the steward out of court, though it did not appear that he was steward by patent, or that there was any such custom for such an examination, was held good.

4. A *feme covert* may receive a copyhold estate by surrender from her husband, because she comes not in immediately by him, but by mediate means, viz. by the admittance of the lord according to the surrender. Co. Comp. Cop. 49. f. 35.

5. A *feme covert* being *secretly examined* by the steward, comes into court with her husband, and *releases by surrender* in court to a tenant in possession; the husband dies; this is good to bind the wife, and the tenant needs no new grant or admittance of the lord, and affirmed the judgment. 2 Show. 82. pl. 70. Mich. 31 Car. 2. B. R. Stone v. Exton.

6. The surrender of a copyhold estate by an infant of 4 or 5 years of age allowed of by this court, yet the lord of the manor insisted, he never heard of any admittance in that manor at such an age. 2 Chan. Rep. 392 2 Jac. 2. Naylor v. Strode.

[45]
Gillb. Treat.
of Ten. 261.
same points.

(E. a) Surrender. How. Conditional and charging the Estate.

1. **THE** father seised of a copyhold in fee surrenders it to the use of his son in fee upon condition to perform covenants in an indenture; the son after admittance surrenders to J. S. upon condition, that if the son pay 10l. the surrender to be void; the son neither pays the 10l. nor performs the covenants; the father enters, and dies seised; the lands descend to the son; it was the opinion of the Court, that by the entry of the father, both the surrenders were avoided, and that the son might well enter after the death of his father, and avoid the surrender made to J. S. Cro. E. 239. pl. 6. Trin. 33 Eliz. B. R. Simonds v. Lawnds.

S. C. cited
Supplement
to Co.
Comp. Cop.
81. f. 15.—
Gillb. Treat.
of Ten. 260.
261. cites
S. C.

2. Surrender was to the use of one in fee upon condition to pay 100l. to a stranger, and if he failed, that it should be to the use of a stranger in fee, whether in this case (upon the tender of 100l. to a stranger, and he refusing) the condition be saved, for as much as it is to be done to a stranger. The Court moved, that it should also be specially found. Cro. E. 361. pl. 22. Mich. 36 & 37 Eliz. C. B. Paulter v. Cornhill.

Gillb. Treat.
of Ten. 260.
cites S. C.
and says,
this case
now seems
to be be-
yond all
doubt, that
the condi-

tion is saved; for it was the design of the parties that the surrenderee should retain the land; therefore if a feoffment be made in fee on condition, that the feoffee shall grant a rent-charge to a stranger, if the feoffee tender the grant, and he refuses, the condition is saved.

3. The lord of a manor demised a copyhold of inheritance to A. on condition to pay 20s. per annum during B's minority, and 100l. at his full age. A. fails in payment, and surrendered to C. and his heirs. The lord admits C. and afterwards B. comes to age, but the 100l. is not paid to B. The lord enters for the condition broken, and grants to B. by copy, and whether his entry was lawful, or that the acceptance had dispensed with the condition, was the question; Fenner J. held that he might well enter, for he to whose use the surrender is made comes in by him that surrendered, and not by the

Supplement
to Co.
Comp. Cop.
71. f. 6 cites
S. C. and
says, it was
held, that
the entry
was lawful.
— 4 Rep.
21. b. cites
1 H. 5. fol.
11, 12. S. P.
— Gillb.

Treat. of
Ten. 316,
317. cites
S. C. and
says, that
surely the

lord, for the lord is but an instrument to convey the land, so the condition is not gone; but Gaudy doubted thereof, &c. *cæteris jussu absent. adjournatur.* Cro. E. 582. pl. 7. Mich. 39 & 40 Eliz. B. R. Pay v. Gibbon and Brown.

lords affirming the power of the copyholder to surrender an estate after the breach of the condition for not paying the 20s. is a good dispensation, for that forfeiture, as well as if he had accepted rent after the forfeiture, for the affirming his power to grant over his estate, is as much an indication of the lord's mind for the continuance of the estate, as the acceptance; but then as for the forfeiture that accrued after the admittance, it seems the admittance could not pass away that, for the land was charged with the condition, into whose hands soever it came, and this seems [46] to be Fenner's opinion, by the reason he gives, for that the *cessu que use* coming in by the surrenderor, the lord by his admittance did not pass away his interest in the condition, the question was, whether the lord had dispensed with the condition, not whether he had dispensed with the forfeiture of the condition broken, for that was not broken in part, till after the admittance; yet, a breach in part was a breach of the whole condition. — A copyholder in fee may surrender, reserving rent, with a condition of re-entry for non-payment, and he may re-enter for non-payment; for having a fee-simple according to the custom of the manor, he may reserve what profits he pleases out of it by the same reason as he may dispose of it as he pleases. Gilb. Treat. of Ten. 146, 147.

4. Where a surrender is made by A. to B. on condition that *B. shall pay 100l. to a stranger*, these words make an estate conditional, and give power implied to the *heirs of A.* to re-enter for non-payment, and if there are words which give power to a *stranger to re-enter*, they are merely void, nevertheless the precedent words shall stand and make the estate conditional; per Doderidge Serjeant; and per Tanfield Ch. B. Littleton says, that such a re-entry is void, for a re-entry cannot be limited by a stranger; Serjeant Nichols said, that if a surrender be made that he shall pay 100l. this makes the estate conditional, and gives a re-entry to the heirs of A. but when it goes further, and limits the re-entry to a stranger, so that it does not leave the condition to be carried by the law, in such case all the words shall be void, because it cannot be according to the intent; as in case of reservation of rent, the law will carry it to the reversion, but if it be particularly reserved, then it will go according to the reservation, or otherwise will be void. Lane 99 Hill. 8 Jac. in the Exchequer, in Gooch's Case.

5. A. made a mortgage surrender to B. but the money not being paid at the day, *B. entered without any admittance, and devised* the copyhold to his son C. and died seised. C. entered, and the lord by agreement took the profits for a time certain in lieu of a fine, but after pretending the land was forfeited, because B. was not admitted, and had paid no fine, refused to deliver up the possession, though the profits received amounted to more than the fine. A. being dead, his heir released to the son of the lord, but without any consideration expressed, and he conveyed the premises to his father; it was held, that though such release had extinguished his entry, yet the same should enure to the benefit of him that had the former right in trust only, and for the use of C. the plaintiff, and decreed the possession to him accordingly against the defendants, and all claiming under them. N. Ch. R. 7, 8, 9. 5 Car. 1. Lucas v. Pennington, Wright, and Noble.

6. The

6. The father both of the plaintiff and the defendant, being seized of a copyhold estate, surrendered the same to the use of his will, and devised it to the defendant, who was his eldest son, paying his debts, and so much money to the plaintiff, his sister, for her portion, when of age; but if he failed to pay the portion, then she was to have as much of the copyhold estate as did amount to the value of her portion. She afterwards came of age, and the defendant refused to pay the portion, whereupon the homage allotted to her as much of the said copyhold lands as they adjudged to be the value of her portion; but the defendant being admitted, refused to surrender the same; thereupon the plaintiff exhibited her bill, to have her portion or the said allotment decreed to her, and the Court gave day for the payment of the portion, and if he failed, then he was decreed to surrender the allotment to the uses declared in the will. Nelf. Chan. Rep. 24, 25. 8 Car. Marston v. Marston.

7. A. the father of M. surrendered to W. his nephew on condition to pay 200l. to M. at 21, and if she died before 21, without heirs of her body, then to W. M. dies before 21, leaving a son; the 200l. was decreed to the son, and that the lands stand charged with it. 2. Chan. Rep. 214. 33 Car. 2. Rose v. Tiller,

2 Chan. Cases 94. Row v. Tiller. Pasch. [47] 34 Car. 2. S. C. the mother died, and

the son died an infant; the husband of M. and father of the child took administration to them both, and sued the son and heir of W. and the 200l. was decreed to the plaintiff. — It is added, that A. gave his personal estate of good value to W. but nothing else of his own to M. his said only child.

8. A copyholder surrenders to the use of J. S. paying his executor 100l. within such a time after his death; he to whose use this surrender is made takes by force thereof presently; per Doderidge J. 2 Bullst. 274, 275. Mich. 12 Jac.

Gilb. Treat. of Ten. 260. cites S. C. that this is a present surrender; for

otherwise it can be of no effect.

[F. a] How; And in what manner a Surrender may be made. By Attorney.

This in Roll is letter (G) in fol. 500.

[1. A Copyholder in fee may surrender in court by letter of attorney without any custom, because he himself might there have surrendered de communi jure, by the common law, without such custom. Co. 9. Combe 75. b, resolved.]

Co. Comp. Cop. 49. l. 34. S. P. and says, that should the law be

otherwise great inconvenience would ensue; for how should copyholders that are in prison, or languishing in bed, or beyond the seas, surrender but by attorney? — A copyholder in fee made a letter of attorney to two tenants of the minor, to surrender his copyhold out of court to the use of J. S. and his heirs; they surrendered the same accordingly, and at the next court brought in the surrender into court, (but no custom was found to warrant such a surrender.) Notwithstanding in that case it was resolved, 1st. That it was a good surrender, because he might do it de communi jure without alleging any custom. 2dly. When the tenants shewed the same in court, and the authority which was given to make the surrender, all which they had done, was resolved to be good, and legally done. Supplement to Co. Comp. Cop. 70, cites 9 Rep. Comb's Case. — Gilb. Treat. of Ten. 208. S. P. and says, the law allows his doing

it by attorney as an incident to the power which he has to surrender in court.——Ibid. 236. S. P. and cites S. C.

Co. Comp. [2. Hill. 28 Eliz. Chapman's Case, cited [in] Co. 9. Combe
* Fol. 501. 76. it was held, that were * by the custom a copyholder out
of court might surrender into the hands of the lord, by the
hands of two customary tenants, that in effect are but attor-
neys, that he *cannot surrender by attorney to the lord by two*
—Gilb. *tenants*, for there the custom, that is the warrant thereof,
Treat. of Ten. 203. ought to be pursued.]
S. P.——

Ibid. 236. S. P. that he cannot do it by attorney without a special custom.

3. Gilb. Treat. of Ten, 236. says, that it is said to be re-
solved that a copyholder *cannot surrender by attorney without*
deed, and cites Pract. Reg. 136. *but that he may be admitted by*
attorney without deed. But the Ch. Baron says, Quære of
this.

4. By Clench; *lessee for years* cannot surrender by attorney,
but he may make a deed purporting a surrender, and a letter
of attorney to another to deliver it. Le. 36. pl. 45. Trin.
28 Eliz. B. R. Anon.

5. A copyholder of the manor of Arundel did *surrender his*
customary lands to the use of his last will, and thereby devised the
lands to his youngest son and his heirs, and died; the *youngest son*
being in prison makes a letter of attorney to one to be admitted
to the land in the lord's court in his room, and also after ad-
mittance to surrender the same to the use of B. and his heirs, to
whom he had sold it for the payment of his debts; and Wray was
[48] of opinion, that it was a good surrender by attorney; but
Gawdy and Clench contrary; and by Gawdy, if he whq
ought to surrender cannot come into court to surrender in
person, the lord of the manor may appoint a special steward
to go to the prison and take the surrender &c. Le. 36. pl. 45.
Trin. 28 Eliz. B. R. Anon.

6. If there be a *special custom that a copyholder for life may*
make estate for 20 years to continue after his death, these estates
cannot be made by attorney. Co. Comp. Cop. 49. f. 34.

7. So if there be a special custom, *that an infant at the age*
of discretion may surrender a copyhold; this surrender being
confirmed by special custom only, cannot be made by attor-
ney. Co. Comp. Cop. 49. f. 34.

8. There was a *custom within the manor of Castle-Dun-*
nington, that any copyholder of that manor may make a writing
in the nature of a letter of attorney to two copyholders of the same
manor, to surrender his copyhold after his death. The question
was, whether this was good custom or not? The Court de-
livered their opinion, that the custom was good; and Roll
Ch. J. said, that the death of the party doth not revoke this
writing made in the nature of a letter of attorney, for it is
strengthened by the custom, and *it is not like an ordinary letter*
of attorney, which becomes void by the death of him that made
it;

it; for this custom is a law, and the authority here survives, as an executor may sell the testator's lands, if he be impowered to do it by the will, and therefore the *custom is good*, and let the plaintiff have judgment nisi, &c. Sty. 423. Trin. 1654 Roby v. Twelves.

[F. a. 2] [Surrender by Attorney.]
How the Attorney shall do it.

This in Roll
is letter (H)
in fol. 501.

[1.] If the letter of attorney be made to men to make a surrender in court, the *attornies ought to pursue the form and manner of the surrender in all points, according to the custom*, as the copyholder himself ought to have done, as if it ought to be by the rod, or other thing. Co. 9. Combe 76. b. resolved.]

[2. The attorney ought to make it *in the name of him that gave him the authority*. Co. 9. Combe 76. b. resolved.] S. C. cited Arg. Godb. 389.

[3. A letter of attorney was made to two to make a surrender, and they *shewed their letter of attorney, and then they autoritate eis per prædictam literam attornati data, surrendered it*, this is as much as to say, that we, as attornies of the copyholder surrender, and both are well done *in the name of him that gives the authority*. Co. 9. Combe 77. Curia.]

(G. a) Surrender, Without expressing to whose Use it shall be. How the Admittance may be.

1. If I surrender generally into the hands of the lord, *not expressing to whose use* the surrender shall be, this surrender is a good surrender, and *shall enure to the benefit of the lord*. Co. Comp. Cop. 49. f. 35.

2. J. W. a copyholder in fee, 10 Eliz. *surrendered his land into the hands of the lord by the hands of tenants*, according to the custom &c. *without saying to whose use* the surrender should be; and *at the next court the said J. W. was admitted habend. to him and his wife in tail, the remainder to the right heirs of J. W.* Resolved by the whole Court for the first point, that the *subsequent ad shall explain the surrender*; for, *quando abest provisio partis, adest provisio legis*, and when the copyholder accepts a new admittance the law intends that the surrender generally made was to such an use as is specified in the admittance, and the lord is only as an instrument to convey the estate, and as it were put in trust to make such an admittance, as he who surrenders would have him to make. Poph. 125. Trin. 15 Jac. B. R. Brook's Case,

[49]
Supplement
to Co.
Comp. Cop.
71, f. 6.
cites S. C.—
Cro. J. 434.
pl. 1. S. C.
and says,
that in many
manors
there are no
other forms
of grant or
limitation.
—Gilb.
Treat. of
Ten. 239.
cites S. C.

and says, that the subsequent admittance explains to what use the surrender was made. — Lord Raym. 626. 627. Hill. 12. W. 3. S. C. cited by Holt Ch. J. and said, that if a copyholder surrenders to the lord without limiting any use, the copyhold belongs to the lord, and *his estate is extinguished*, in the same manner as if tenant for life at common law releases to him in reversion; and then the grant will be a voluntary grant of the lord.

3. If a surrender be to the lord, *quod inde faciat voluntatem*, yet by custom the surrenderor by petition or declaration may direct it to any person whatever, and the lord must pursue it, and there is no estate in the lord, but it remains in the tenants hands till admittance of such party, and the purchaser may come in at any time; per Cur. 2 Keb. 823, 824. pl. 41. Mich. 23 Car. B. R. in Peebles Case.

4. If a surrender be made to the lord expressing no use, it shall be to the use of the lord; for it cannot be imagined that the surrender was made to no end or purpose; and a surrender may be made to the lord, and no use need be expressed. Gilb. Treat. of Ten. 239.

[50] (H. a) Surrender. Absolute Surrender. To what Lord. Disseisor.

S. C. in B. R. in error on judgment in C. B. but adjournatur. 1 Show. 153. Pitt v. Moor. — Skinn. 28. pl. 4. S. C. argued. — 1 Mod. 287. Moore v. Pitt. S. C. North Ch. J. and Windham inclined, that the surrender was not good; but Atkins J. e contra. — Vent. 359, S. C. argued, & adjournatur. — Freem. Rep. 245. pl. 257. S. C. argued.

1. **A**N absolute surrender by a remainderman for life to a disseisor lord's own use was held not good, and the copyhold not extinguished thereby, for he had no estate capable of a surrender; for the possession of the copyholder for life prevented a disseisin, and so the reversion continued in the rightful lord; but had the surrender been to the use of another it had been good, the lord in that case being only an instrument, and the estate not out of the surrenderee till the admittance of the surrenderor. And so a judgment in C. B. was affirmed per tot. Cur. 2 Jo. 253. Pasch. 33 Car. 2. B. R. Pitt v. Moore.

(I. a) Surrender to the Use of a Will.

Dal. 76. pl. 3. S. C. for he had respect to that in making his surrender, and by his saying he surrendered all his land accordingly, he shewed that his intent was only to pass those lands that were devised by the will. — Here was no question about the validity of the surrender, which was only by parol, and into the hands of the 3 tenants of the court, but it is not said, in court, and indeed the case cannot well be supposed to be in court for then the surrender had been to the lord or steward, and there can be no reason why a surrender in court by words should be of more validity than a surrender by words out of court. G. Treat. of Ten. 257.

1. **A**. Seised of copyhold lands devised a certain parcel of them to his wife for life, remainder to his brother and his heirs, and afterwards in presence of 3 persons of the court said to them, *I have made my will as I would have it, and here I surrender all my copyhold lands into your hands accordingly*; by this not all his copyhold lands are surrendered, but those only mentioned in his will. 3 Le. 18. pl. 43. 14 Eliz. B. R. Anon.

2. A. devised that B. should have a copyhold in fee (or devised a copyhold to B. for ever) and afterwards a surrender

is made unto the lord *to grant* the copyhold *according to the will*; the lord may grant to B. in fee. Godb. 137. pl. 162. 29 Eliz. B. R. Allen v. Patshall.

3. A. copyholder in fee devised to his wife for life, and that she should sell the reversion for payment of his debts, and afterwards he surrendered to the use of his wife for life *according to the will* and deed [and died.] It was adjudged, that she might sell this because in his *surrender he referred to his will*, and afterwards she surrendered upon condition to pay 12l. this was held to be a good sale according to the will. Cro. E. 68. B. R. Hill. 29 & 30 Eliz. Bright v. Hubbard.

Supplement
to Co.
Comp. Cop.
81. f. 15.
S. C.—
Gilb. Treat.
of Ten. 258,
269. S. C.

4. A copyholder surrenders to the use of his last will, and he afterwards makes a will, *the lands do not pass by the will, but by the surrender*; for *the will is only declaratory of the uses of the surrender*. Bulst. 200. Pasch. 10 Jac. Semain's Case.

5. Copyholder in fee surrenders to the use of his last will, *which he said he would leave with his partner Mofs; Mofs dies; he recites the surrender, and makes his will*. It seems the devisee shall have the lands; for *these words, (that he would leave in the hands of his partner Mofs) are only words of demonstration, and no way operative or restrictive of the operation of the surrender or devise*; and it is a rule in law, when an act is to be done, with reference to another thing, which is impossible, illegal, or variant, the act shall stand, and the reference be void. Gilb. Treat. of Ten. 258.

Litt. Rep.
23. The
King v.
Eaton S. C.

6. A surrender was made to a *feme covert*, of copyhold lands, with *power reserved to her to surrender it to such uses as she by writing, or last will, in the presence of 3 witnesses should direct* or appoint. She made a will in pursuance of her power executed in the presence of 3 witnesses, and gave it to her daughter and heir. Afterwards she made a surrender, together with her husband, to the use of her husband and his heirs; but this was made in the presence of 2 witnesses only, who subscribed their names (as witnesses;) but the deputy steward, who took the surrender, had set his name to it. On a bill by the husband after the wife's death to establish this surrender, who would have the steward to be considered as a third witness, the daughter, the defendant, pleaded a title by the will, and also demurred, for that the plaintiff's title, if any, was only at law, and he might bring ejectments. Ld. Chancellor seemed to think the plea good, as a plea of the defendant's title, and the demurrer good likewise, as a demurrer to the plaintiff's title. But at last he over-ruled the plea, and allowed the demurrer. Abr. Equ. Cases 42. Trin. 1728. Cotter v. Layer.

[51]

7. If a copyholder after admittance surrenders the lands to the use of his last will, and gives them to J. S. but the will is not attested by any witness, yet J. S. is well intitled to the lands; per Ld. Chancellor. Barnard. Chan. Rep. 11, 12. Pasch. 1740. Tuffnell v. Page.

Ibid. cites 2.
Vern. 597.
Attorney.
General v.
Bains, and
Ld. Chan-
cellor said,
that

5. If a *copyholder* surrenders his copyhold, *he cannot have it again unless by surrender.* Mar. 21. pl. 48. Pasch. 15 Car. Anon.

For the mortgagor has no estate in him whereof to make any

6. Copyholds in mortgage may be devised without the formality of a surrender to the use of a last will, for the copyholder has only an equity of redemption. Vern. R. 69. pl. 65. Mich. 1682. Brent v. Best.

surrender. Ch. Prec. 322. in case of Greenhill v. Greenhill.——Toth. 142. cites Mich. 14 Car. Highgate v. Highgate S. P.——3 Wms's Rep. 358. pl. 96. Trin. 1735. King v. King and Ennis. S. P.

[53] 7. *Surrenderer of copyhold lands assigns them, together with freehold lands, to J. S.* Per Lord Chancellor the copyhold could not pass but by surrender only and not by conveyance. 2 Ch. Cafes 43 Hill. 32 & 33 Car. 2. Knight v. Cook.

Ch. Prec. 320. S. C. —G. Equ. Rep. 77. S. C.

8. *Customary lands within the County Palatine of Cornwall,* though they pass by lease and release, yet by the custom cannot be devised without a surrender, yet one, who has *an equitable interest* only, and not the legal estate, may *devise* them without making a surrender. 2 Vern. R. 679. pl. 604. Hill. 1711. Greenhill v. Greenhill.

9. Mod. 68. S. C. and affirmed in the House of Lords.

9. Where a person purchases land in the name of another, or *has only an equitable and not the legal estate*, he may devise the same without a surrender; per Parker C. 10 Mod. 519. 529. Mich. 10 Geo. 1. in Canc. Acherley v. Vernon.

10. *An equity of redemption of a copyhold may be devised without being surrendered* to the use of a will. 3 Wms's Rep. 358. pl. 96. Trin. 1735. King v. King and Innis.

(M. a) Surrender. Want of Surrender, or defective Surrender. Supplied in Equity. In what Cafes.

1. A Copyholder in fee surrenders to the use of one, and to his heirs, upon condition of redemption, writes down his debts, and willeth part of his copyhold to be sold for payment of his debts after his death; one of the creditors payeth the money at the day to the mortgagee, who nevertheless inrolleth the surrender afterward, this other creditor complains against him and the heir in Chancery, and had a decree that the copyhold should be sold for the payment of debts, and remainder of it (if any were) should descend to the heir, for although the devise of the copyhold be void, yet to take it from the surrenderee, (who held it only for money to be paid) and to pay him and the other creditors therewith, hath good warrant in equity, and the heir hath no wrong, for that it was gone from him by the surrender lawfully. Cary's Rep. 9, 10. cites 41 Eliz.

2. A purchased a copyhold for the lives of himself and B. and C. his sons. A. alone paid the fine. A. agreed to surrender all his

his title to J. S. who paid the purchase money agreed upon. A. died before any surrender made. Then J. S. died. His executors brought a bill against the sons of A. to compel them to surrender the copyhold according to the agreement; and decreed accordingly. Chan. Rep. 272. 18 Car. 2. Greenwood v. Hare.

3. A. covenanted with the trustees to settle freehold lands on himself and M. his wife for life for part of her jointure, remainder over, and to surrender certain copyhold lands to the same uses, and in going to make a surrender he fell sick by the way, but made a letter of attorney to others to do it, but died before it was done. The remainders limited were to the heirs male of the body of A. by M. remainder to the heirs male of his body, remainder to B. brother of A. and the heirs male of the body of B. remainder to the heirs of A. The heir male of B. prayed a conveyance of the copyhold; Lord Keeper said, that if A. had had a son by a former wife, no relief could be had against him upon this covenant, which as to the plaintiff was merely voluntary, and if A. and B. were both living, B. could not enforce A. to execute the covenant though M. might, and dismissed the bill. Ch. Cases 243. 14. January 1674. Bellingham v. Lowther and Wentworth.

S. C. cited
Arg. 2.
Wms. Rep.
249. in case
of Osgood
v. Strode.

4. Supplied in favour of a jointress. Fin. R. 388. Trin. [54] 30 Car. 2. Marlow v. Maxie & al.

5. The plaintiff having contracted with the defendant's father for the purchase of a copyhold estate, the plaintiff paid the purchase money, and the defendant's father agreed to surrender the premises at next court, and said, he had made a surrender lately to the use of his will, which would enure to the benefit of any purchaser, but before next court day, and any surrender made, the defendant's father died. This Court decreed the defendant when he came of age to surrender effectually the premises to the plaintiff, and the lord of the manor presently to admit the plaintiff tenant to the premises. Chan. Rep. 218, 219. 33 Car. 2. Barker v. Hill.

6. Surrender being to one copyholder only was supplied against the heir in favour of the younger children. Vern. 132. pl. 120. Hill 1782. Hardham v. Roberts.

7. By the custom of the manor of Yelminster Prima in Devonshire, every copyhold tenant of that manor may, in the presence of two witnesses, nominate his successor, and such nominee shall enjoy the lands after him for life, and the person who nominates may except any part of the lands to any other person, yet the nominee continues tenant to the lord for the whole, but the person to whom any part is excepted shall enjoy any part during his life; and if any tenant dies seized, leaving a wife, and makes no nomination, then the wife shall have the tenement during her life, else it goes to the lord; a copyholder by his will intending to give the greatest part of his estate to his godson, and the other part to his wife, the wife persuades him to nominate her to the whole, and that she would give the godson the part designed for him; decreed against the wife,

wife, notwithstanding the statute of frauds and perjuries; Chan. Prec. 3. pl. 3. Hill. 1689. Devenish v. Baines.

8. Chancery will help the want of a surrender in case of a *purchaser*; per Hutchins: 2 Vern: 165: Trin: 1690. in Case of Hitchcox v. Sedgwick:

But A. devised his copyhold being borough English to his eldest son and houses in London to his youngest son. The houses were soon after burnt down and the youngest son never entered upon them. The court therefore as this case was circumstanced would not supply the defect of a surrender.

2 Vern R. 265. pl. 251. Pasch. 1692. Cooper v. Cooper.

9. Equity will supply the want of a *surrender of a copyhold as well for an elder son as a younger, in case of Gavelkind copyhold*, if it appears to be the intent of the will, that the eldest son should have the copyhold, *paying a legacy thereout to the youngest son*; per Lds. Commissioners. 2 Vern: R. 163. pl. 152: Trin. 1690. Bradley v. Bradley:

10. A copyholder in fee, having issue two daughters; *devised a copyhold estate to his younger daughter, whereby her fortune was made much more considerable than the eldest sister's*, and there being no surrender made to the use of his will, the question was, Whether that defect should be supplied in this court; for although that defect is generally supplied, where it is for a provision for a wife or child, yet in this case, in case it were not supplied, her fortune would have been equal to her other sister's and the copyhold would have descended equally to them both; yet notwithstanding it was supplied here, being intended a provision for a child, though it made her superior to her elder sister in fortune. Ex Relatione M^ri Poley. 2 Freem. Rep. 234. pl. 305. Baker v. Jennings.

11. Decreed that all devises by copyholders *for the use of children or creditors*, and all charges made by them upon their lands for the benefit of children or creditors, will be good in a court of equity, though there was no surrender to these uses. 3 Salk. 84. pl. 5. Pasch. 11 W. 3. Pope & al. v. Garland.

[55] 12. A younger son brings a bill, and *surmises that a copyhold which his father had devised to him by will was surrendered to the use of his will, or however that being for the advancement of a child, it ought to be made good here*. He made no proof of any surrender, nor that a court was called for that purpose, nor any proof that any of the court rolls were lost (which was pretended) and *he was well provided for, without this copyhold, and the elder brother was in possession 20 years, by consent of the plaintiff*; so the bill was dismissed, with costs. Abr. Equ. Cases, 123. Pasch. 1700. James v. James.

2 Vern. 625. S. C. cited in the case of Litton-Strode v. Ruffel and Falkland.

— Upon citing the

case of Kettle v. Townsend by Mr. Pooley, in the case of WATTS v. BULLAS, Mich. 1708. the

the Master of the Rolls then in court with Ld. K. Wright said, that it was his opinion, that such a devise without a surrender ought to be made good to *grand-children* as well as to children, and that if the same case was to come on then in the House of Lords it would be so ruled, and that he had and would decree it so. *Wms'a. Rep. 61.*

And in a note there added to the report of the case of *Watts v. Bullas*, it is said, that the like was declared by Ld. Harcourt, in the case of *PRESTON V. RANT*, Trin. 1712. and the note says, that it is observable, that the case of *Kettle v. Townsend* being cited before Ld. Cowper in the case of *FORSAKER V. ROBINSON*, (Mich. 1717) his lordship doubted thereof, in regard that the *grandfather*, by the act of 43 Eliz. for maintaining the poor, is bound to maintain his *grand-child*, which he said he believed was not taken notice of in that case. *Ibid. 61.*

14. *Cesty que trust* of a copyhold devised it to his wife, and the trustees were decreed to surrender accordingly. 2 Vern. 498, 499. pl. 449. Pasch. 1705. *Burkit v. Burkit.*

15. A mortgage surrender was made to A. to secure 200l. but was not presented at the next court, and so was void according to the custom of the manor. Some years after the mortgagor (the mortgage money not being paid to A. agrees to sell to B. for 400l. but B. having notice of the former surrender takes a surrender in C's. name who had no notice, and agrees to become the purchaser, and pays the consideration money; and upon a bill for relief by A. against B. and C. C. pleads his being a purchaser without notice, the presentment of his surrender and admittance, and the non-presentment of the surrender to A. till long after. Adjudged that this notice was sufficient to affect C. and decreed C. to pay A's. money or surrender to him; and though C. did not employ B. to purchase for him, or knew any thing of it till after B. had agreed and taken the surrender in B's. name, yet he approving it afterwards made B. his agent *ab initio*. Decreed at the Rolls and afterwards by Lord Cowper. 2 Vern. 609. pl. 547. Pasch. 1708. *Jennings v. Moore, Blincombe & al.*

16. Chancery will not supply the want of a surrender of a copyhold for a devisee to disinherit an heir at law; per Tracy J. 3 Ch. R. 187. Trin. 7 Ann. *Litton, alias, Strode v. Falkland.*

17. It will help no further than a son, a wife, or a creditor; per Trevor Ch. J. and Ld. Chancellor. 3 Chan. Rep. 187, 188. Trin. 7 Ann.

3 Chan. Rep. 520. Arg. says, that if it is of charitable uses.

2 Vern. 636. pl. 564. S. C. Ld. Chancellor took it, that nothing was intended to pass but the freehold, and affirmed the decree.

18. A. on the marriage of B. his son makes a feoffment of certain freehold lands by the name of such and such farms in trust for B. for life, then to his intended wife for life, then to his first son, &c. and for want of such issue, then in trust for the right heirs of B. It happened, that 8 acres, part of one of these farms, were copyhold, and there was a covenant in the deed, that A. should surrender those 8 acres to the uses as the freehold lands were therein limited. B's. wife dies without issue, so that trust of the fee-simple was in B. who mortgages the farm of which the 8 acres were parcel by the name of such a farm, with the general words, All and singular the lands and tenements, parcel thereof, or usually occupied therewith &c.

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but

but does not mention the 8 acres of copyhold by name, nor is there any covenant in the mortgage deed to surrender them. B. dies, and his heir conveys the equity of redemption to the mortgagee, and afterwards A. at the request of the heir of B. surrenders the 8 acres copyhold to J. S. to whom A. was indebted by judgment. Upon a dispute between the mortgagee and J. S. it was said, per Cowper C. that the copyhold lands were never by the mortgage under any *specific lien*, and that the mortgage reciting the settlement in which the copyhold lands appear, and the mortgagee taking no care to get a conveyance of them, nor so much as naming them, he should hold, that if the freehold lands were sufficient the copyhold should not pass by the deed, though there was no creditor or purchaser in the case, and if so J. S. hath both *law*, and the better *equity* on his side; and he relied upon that substantial difference, where there is a *specific lien*, and where not, which distinguishes this case from that of *Taylor v. Wheeler*, where the copyhold was specifically bound by the mortgage. *G. Equ. R. 13. Hill. 7 Ann. Oxwith v. Plummer.*

19. Bill to have an account of the real and personal estate of their father, and a partition of his real estate.

The case was, B. having several freehold and copyhold lands, *devises all his lands, goods and chattels to his three sons, equally to be divided between them, and devises over and above this 100l. to his eldest, provided he gives a lawful, good, and general release to his two younger brothers, and by his codicil appoints, that if one of his younger sons should die or marry in his minority without consent of his executors, then his portion to go to the other younger son.*

2d Point, if the copyhold lands should pass by his devise without a surrender to the use of his will? *Ld. C.* was of opinion, that the copyhold lands do not pass by the devise for want of a surrender to the use of the will, though in the case of younger children, because *there are freehold lands to satisfy the words of the will.* *MS. Rep. Mich. 12 Ann. Canc. Bullock v. Bullock.*

Defective
surrender of
a copyhold
to the use of
a last will
supplied,
especially
where it is
for the benefit
of the devise-
e's children.
MS. Tab.
Feb. 18.
1715. Lloyd
v. Burton.
— *S. C.*
cited 3
Wms's Rep.
285. by the
Ld. Chan.

20. Andrew Burton was seised of freehold, leasehold, and copyhold land, and so seised made a surrender of his copyhold to the use of his last will (he delivered the surrender to his tenant of the copyhold [who was one of the customary tenants of the manor] to be presented at the next court, but took it back from him, and both the said Andrew and his tenant were at a court held shortly after, but did not present the surrender) whereby he devised his copyhold to Andrew his eldest son, and the heirs male of his body, the remainder to Cornelius his 2d son, who was by a 2d venturer and the heirs male of his body, remainder to Barton his 3d son and the heirs male of his body, remainder to his own right heirs. The deviser died, leaving the said 3 sons and one daughter, who was by the first venturer the eldest son entered upon the copyhold, and received the rents and profits of it during his life, but did not present the surrender, and died without issue, whereupon his sister

of

of the whole blood, wife to the defendant Floid, claimed as heir at law to her brother, whom she conceived to be seised in fee for want of a surrender; the tenant attorned to the defendant in right of his wife, whereupon the plaintiff, 2d wife of Andrew the father, brought her bill as guardian to her two sons, Cornelius and Barton, to have the copyhold according to the will; the counsel for the defendant insisted, that the want of a surrender ought not to be supplied in this case, because the younger sons have an ample provision by the will, besides the intended copyhold, and that the Court of Equity supplies the want of a surrender against the heir at law only where the intended estate is the sole provision made for those to whom such estates are devised: they further insisted, that though the Court will supply the want of a surrender for the benefit of younger children where there is a sufficient provision for them besides, yet in this case it ought not, because the acts of Andrew the father, subsequent to his making the surrender, amount to a revocation of it; and manifest his design to be, that the surrender should not be presented, as his taking it back from his tenant to whom he had given it to present, and his neglecting to present it at court at which he was present, and had an opportunity to do it; but Trevor, Master of the Rolls, decreed for the plaintiff, and as to there being a sufficient provision by the will for younger children besides the copyhold, he said that the parent was the only judge of that, and as to those acts of the testator, which it was said amounted to a revocation of the surrender, he said they did not, and that if it had been the testator's design that the copyhold should not be surrendered to the use of his will, he should have revoked it, and observed that there was not so much as parol evidence of a revocation. This cause was reheard before Harcourt Lord Chancellor, who affirmed the Master's decree, and that the defendants should join in a surrender pursuant to the will. MS. Rep. Mich. 12 Ann. Canc. Burton v. Floid and Ux.

21. It was denied to be supplied in case of a wife to whom the husband devised it by his will, it being suggested, that she was otherwise amply provided for out of the testator's freehold and personal estate, but the heir at law had no other provision but the copyhold, which was but 30l. per annum, whereas the provision for the wife was according to her fortune, which was upwards of 3000l. but the Court sent it to the Master to inquire into the facts and report it specially before they could make any decree in it. G. Equ. R. 121. Mich. 2 Geo. 1. in Canc. Biscoe v. Cartwright.

22. A. seised of copyhold lands, and also of a considerable estate in fee, which he had settled on a Papist, contrary to the statute of 11 & 12 W. 3. cap. 4. to surrender the copyholds, for he had made a letter of attorney to W. R. to surrender them, and the steward or tenant refused to accept the surrender, insisting that they ought to keep the letter of attorney, upon which they broke off, and no surrender was made; and Cowper C.

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thought

cellor, Trin. 1734, as decreed first by Sir John Trevor, at the Rolls in Trin. 1712, and affirmed by the Ld. Chancellor in Mich.

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1713; and in a note there by the reporter marked [A] he cites the S. C. from the Register's book accordingly.

thought this a lucky accident in favour of the heir, which equity ought not to deprive him of any more than if the copyholder and the lord had *disagreed about a fine*, which had prevented a surrender, and that this being a *voluntary conveyance* was not to be assisted in equity, as a *conveyance to a wife or a child* would be. but it did *not appear that A. had done all in his power to make the surrender*, and therefore the Court declared that the title to the copyholds was in the heir. Wms's. Rep. 354, 355. Trin. 1717. Vane v. Fletcher.

23. *But if the heir had done any thing to prevent the acceptance of the surrender it had been material*; per Cowper C. Ibid. 355.

24. Sir Charles Rowley *devised copyhold lands to his daughters*, without surrendering them to the use of his last will and died; Carew Rowley, *his son and heir, entered, and mortgaged them for 400l. the mortgagee assigned his mortgage to one of the plaintiffs*. The first question was, whether the want of a surrender should be supplied for the benefit of the daughters, seeing they had a very large provision besides the copyhold lands? The second was, whether the mortgage which was taken and assigned without notice of Sir Charles's devise, should be first discharged? Cowper Ld. Chancellor, as to the first decreed that the want of a surrender should be supplied for the benefit of the daughters notwithstanding their other provision, because the father was the best judge what was a sufficient provision for them. As to the second, he decreed, that the mortgage being had without notice should be first discharged, there having been laches in the daughters. MS. Rep. Mich. 4 Geo. in Canc. Weeks v. Gore.

Ibid. 137.
The case of
BURTON V.
LOYD, in
Ld. Har-
court's time,
is said to be
in point.—

3 Wms's.
Rep. 283.
pl. 71. S. C.
of Cook v.
Araham,
decreed ac-
cordingly.

25. A. had issue two sons B. and C. B. died, leaving H. a son. A. being seised in fee of freehold and copyhold lands, *devised all his mesuages and lands, whether freehold or copyhold, to H. his grandson and heir at law for life, remainder to the first and other sons of H. in tail, remainder to daughters of H. in tail, remainder to C. in fee*. A. died without making any surrender to the use of his will, but had *made other provision for C.* H. died without issue, but surrendered the copyhold to the use of his will, and devised it to his mother in fee. It was decreed at the Rolls, that this being no present provision intended for C. the defect of a surrender should not be supplied; but Ld. C. Talbot reversed the decree, and ordered the defect to be supplied; and as to other provision being made for C. he said, that it had been often held here, that *the father is the sole judge of the quantum of the provision*, and as to this remainder to C. not being to be intended as a present provision, he held this to be a provision, though not so good an one as a present provision; that in this case it could not be said, that the heir was disinherited, for when this remainder is to take place, C. then becomes heir at law himself by the default of issue of H. Nor can it be said that there is an heir unprovided for; for though he is made only tenant for life,
yet

yet there are limitations to all his issue, who are to take before C. the plaintiff. Cases in Equ. in Ld. Talbot's Time. 35. Trin. 8 Geo. Cook. v. Arnham.

26. The defect of surrenders has been supplied even *where the copyhold intended to pass has made but part of the provision*, and so not liable to the objection of leaving the child utterly unprovided for in case the defect was not supplied; for the court has never yet entered into the consideration of the quantum proper for each child; per Ld. C. Talbot. Cases in Equ. in Ld. Talbot's Time, 36. Trin. 1734. in Case of Cook. v. Arnham.

27. A. seised of freehold and copyhold lands, *devised all his real and personal estate for payment of his debts*, but made no surrender of the copyhold. The personal estate and the freehold were not sufficient to pay the debts. Ld. Cowper would not supply the defect, because the words did not express the copyhold, or shew any intention to pass it; but it was said, that where there *was no freehold at all*, the Master of the Rolls had supplied the defect of a surrender. Ch. Prec. 407. pl. 275. Trin. 1715. Challis v. Calborn.

So in case of legates it will not be supplied. Abr. Equ. Cases 123. pl. 12 Hill. 1699. Rafter v. Stork.

28. Surrender is not to be supplied where it will put the younger children *in better condition than the elder*. Mich. 1729. in Case of Rofs v. Rofs.

It is the circumstances of the case that induce the court to

do it, for they will not do it in all cases. 2 Freem. Rep. 115. pl. 128. agreed Anon.

Hill. 1690.

29. One *by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by the will*; the copyhold, though not surrendered to the use of the will, shall yet be applied to the payment of the debts *pari passu* with the freehold; and it had been sufficient if the testator had only said, *I charge my copyhold land with the payment of my debts*; in which case equity would have supplied the want of a surrender. 3 Wms's. Rep. 96, 97. Hill. 1730. Harris v. Ingledew.

This the reporter admits to be so, but observes, if it were but an equitable charge, and the legal estate of the copyholder had descended to

the heir, that would have made it necessary that the heir should be a party, because otherwise the legal estate of the copyhold could not be conveyed to a purchaser; but if it had appeared (which he thinks did not) that the heir at law had, since the testator's death, conveyed away all the copyhold estate, then indeed the grantee of the heir being capable of conveying to the purchaser, it might not be necessary to make the heir a party. 3 Wms's. Rep. 97. [* 59]

30. Bill by the plaintiffs for an injunction against the defendant, eldest son of a copyholder, to make good the defect of a surrender of a copyhold in favour of a will, *whereby the father gave this copyhold, and all other his estate for the maintenance of the plaintiffs, his younger children, till 21, and then to be divided amongst the plaintiffs, and the defendant to have a share*. Lord Chancellor said the rule is, when the eldest son is totally disinherited not to interpose, and *this is very near to a total disinherison*, the eldest not being to have any thing till the youngest are of age. Injunction denied. MS. Rep. Mich. Vac. 1733. Hicken & al. v. Hicken.

13. If a man devises all his lands, tenements, and hereditaments in *Dale*, in trust to pay his debts and legacies, and the testator has some freehold and some copyhold lands, there, only the freehold lands shall pass; for his will must be intended of such lands and tenements, as are deviseable in their nature; otherwise if the testator had surrendered his copyhold lands to the use of his will, because this shews he did intend to devise his copyhold; but even in the first case, if the freehold were not sufficient to pay his debts, when the testator devises all his lands in trust to pay his debts, it seems rather than the debts should go unpaid, that the copyhold shall in equity pass. 3 Wms's. Rep. 322, 323. pl. 83. Trin. 1734. Haslewood v. Pope.

32. Where a man devises his real estate to be sold to pay debts and certain pecuniary legacies, and subject to his debts and legacies devises his personal estate to his sister, this court will not supply the defect of a surrender of the copyhold to the use of the will if the other estates suffice to pay the debts. Cases in Equ. in Ld. Talbot's Time. 78. Pasch. 1735. Mallabar v. Mallabar.

(N. a) Operation and Effect of a Surrender.

3 Le. 197. 1. **A** Copyholder made a lease for years, with licence &c. rendering rent, and afterwards he surrendered the reversion, with the rent, to use of a stranger who was admitted; it was held by Rhodes and Windham, Justices, that the surrender and admittance were in nature of an inrolment, and so amount to an attornment, or at least do supply the want of it. 1 Le. 297. pl. 408. Hill. 28 Eliz. C. B. Anon.

Le. 174. pl. 243. S. C. 2. Tenant for life, the remainder in fee of a copyhold, he in the remainder made a lease by parol; tenant for life, and he in the remainder, join in a surrender to the use of him in the remainder in fee; it was the opinion of the justices, that the lease was good against him in remainder, and that by the surrender of the tenant for life to the use of him in the remainder, his estate is drowned in the fee, and as it were extinct, and cannot hinder the lease to have operation. Cro. E. 160. pl. 49. Mich. 31 & 32 Eliz. B. R. Dove v. Williot.

3. The fee-simple of a copyhold surrendered to the use of a man's will remains in the copyholder, and not in the lord. 4 Rep. 23. a. Pasch. 39 Eliz. B. R. Fitch v. Hockley.

And the surrenderor shall have the profits. Noy 152. Hill. 5 Jac. C. B. Allen v. Nash. — Cro. E. 441, 442. pl. 4. S. C. — Gilb. Treat. of Ten. 319, 320. cites S. C.

[60] 4. If a copyholder surrenders his land to the use of a stranger, in consideration that the same stranger shall marry his daughter before such a day, if the marriage succeeds not, the stranger takes nothing by the surrender; but if the surrender be in consideration, that the stranger shall pay such sum of money at such a day, though the money be not paid, yet the surrender stands good. Calth. Reading. 36, 37.

5. A *right or condition* cannot be given or determined by surrender, but by release. Cro. J. 36. pl. 11. Trin. 2 Jac. B. R. Hull. v. Sharbrook. 4 Rep. 28.
b. Kite v.
Queinton.

6. Copyholder made a surrender *to the use of his second son for life, after the death of him and his heirs*; adjudged no good surrender; for though it be good in a will, yet *implication is not good in a surrender*; and in copyhold cases a *surrender to the use &c. is no use*, but an explanation how the land shall go. Brownl. 127. Hill. 5 Jac. Allen v. Nash.

7. If there are *two [joint] copyholders*, and *one surrenders to the use of his will*, and makes his will &c. and dies, there shall be *no survivorship*; cited by Coke Ch. J. as adjudged. Noy. 152. Hill. 5 Jac.

8. Surrender and admittance in court *are publick acts*, whereof every tenant may take *notice*, and if copyholder surrender the reversion of 2 parts of his copyhold in lease, the surrenderee may avow after admittance without attornment. Lev. 40. Trin. 13 Car. 2. B. R. Bluck v. Mole.

9. Surrenderee of copyhold is within the equity of 32 H. 8. 3. to bring *debt or covenant against the lessee*. 1 Salk. 185. pl. 2. Mich. 3 W. & M. B. R. Glover v. Cope.

10. Admittance *relates* to surrender, and surrenderee's *title* began by the surrender. 1. Salk. 185. pl. 3. Pasch. 5 & 6 W. & M. B. R. Benfon v. Scott.

11. Copyholder in fee surrendered into the hands of the lord *to the use of himself and the heirs male of his body, but died without admittance* upon the surrender. It was unanimously resolved, that without admittance on the surrender he continues seised in fee as before; for the lord could otherwise have no remedy for his fine &c. Holt's Rep. 165. pl. 10. Trin. 5 Ann. Brown v. Dyer.

Supplement
to Co.
Comp. Cop.
67. f. 1.
S. P. in case
where the
copyholder
does sur-
render his
copyhold

in the court of the manor to the use of the lord himself (which he may do) there, by such a surrender, the land is immediately vested in the lord without any other act done or required, because the lord cannot take a surrender to make thereof an admittance to himself.

(O. a) Operation and Effect of a Surrender. In what Cases it shall be a Discontinuance.

1. **A** DMITTING the copyhold lands may be intailed, then a surrender thereof by the tenant in tail is a *discontinuance to put the issue to his action*; for he must take it subject to all the inconveniences which an estate tail at common law is subject to. Cro. E. 717. pl. 43. Mich. 41 and 42 Eliz. C. B. Eriish v. Reeves.

2. If there hath been a *custom* in a manor *that plaintiffs should be prosecuted there in nature of real actions, if a recovery* be had upon such plaintiffs *against tenant in tail, it is a discontinuance*; for since the custom warrants the recovery, *it is an incident to such a recovery by the common law, that it should be a dis-*

tinuance, which it seems is drawn from the nature of the thing; that a judgment given in a court of judicature ought not to be avoided, but by matter of as high a nature, viz. by a recovery in a court of judicature, and not by the entry of the party that hath right. Gilb. Treat. of Ten. 176. 177.

3. There are cases that a surrender is a discontinuance of an estate tail in copyhold lands, and my Ld. Coke says, that a surrender by *custom* may bar an estate tail; but these opinions for discontinuing by surrender do not seem to be grounded upon that reason or authority, *as the contrary opinion is*; for there are more reasons *against* it than for it. Gilb. Treat. of Ten. 178. 179.

(P. a) Surrender. Good in respect of the Estate of the Surrenderor.

1. **A** *Woman copyholder for life took a husband, the reversion of the said copyhold was granted to 3, viz. to A. B. and C. cum acciderit post mortem, sursum-redditionem, or forisfact.* for their lives successively according to the custom; *the husband surrendered to the use of A. for life, to whom the lord granted it by copy for the life of A. and C. and B. died.* It seems to divers justices and serjeants that C. shall not be admitted; for *after the death of the husband the wife may enter, or have her plaint in nature of a cui in vita*, but during the life of her husband the lord may retain it in his own hands in nature of an occupant, after the husband. But further the husband and the wife would have released to C. and the lord would not receive it, nor hold a court, but he was enjoined in Chancery to hold court, or to avoid possession. Dyer 364. pl. 38. Trin. 9 Eliz. Roswell's Case.

After the death of tenant for life remainder-man before ad-

2. Surrender *by the heir before admittance* is good, but this shall not prejudice the lord of his fine by the custom of the manor due to him on descent. 4 Rep. 22. b. pl. 1. Mich. 23 and 24 Eliz. C. B. Brown's Case.

mittance may surrender the land, for the first admittance was sufficient. 4 Le. 111. pl. 226, in the time of Queen Eliz. Hezger v. Felston. — The heir of a copyholder before his admittance held by the copy of his ancestor, and so he has title, but a surrenderee can have no title before admittance; Arg. Sty. 146. Mich. 24 Car. B. R. in case of Barker v. Denham.

Mo. 596. pl. 813. S. C. adjudged by all the justices because no livery was made of such estate,

3. If a *man seised of a copyhold in right of his wife surrenders it to the use of another in fee, who is admitted* accordingly, and the baron dies, *this is no discontinuance* to the wife or her heirs, but that the wife may enter, and neither she nor her heir shall be put to sue a cui in vita. 4 Rep. 23. pl. 4. Pasch. 35 Eliz. B. R. Bullock v. Dibley.

nor can a warranty be annexed to it for the benefit whereof a discontinuance is admitted. And cites S. P. adjudged Mich. 32 and 33 Eliz. C. B. Foxley v. Cosen. — Supplement to Co. Comp. Cop. 80. f. 19. cites S. C. — Gilb. Treat. of Ten. 177. cites S. C. accordingly; for by the surrender he gives up no more than he had, and therefore could not give away his wife's right though before entry she cannot be said to be tenant, because the surrenderee is by the lord's ad-

mittance

mittance made his tenant, and this is not like * a *scoffment at common law*, which being so notorious a way of conveying estates, the wife's entry was taken away, the whole estate being passed away to the feeoffee for the benefit of strangers, who could never have known whom to have brought their præcipe against, if the estate did not pass by so notorious a conveyance, and if the still might have entered, they could never know whether she were a trespassor, or in whom the freehold was rightfully vested. But in case of copyhold lands, as there is no such inconvenience, so the nature of the conveyance will not admit of such exposition; for a surrender is but a giving or yielding up that estate one hath from another; and it is in the nature of things impossible to surrender more than one hath. * Cites Cro. E. 717. [per Cur Mich. 41 and 42 Eliz. in the case of *Erish v. Reeves*.—Poph. 38, 39. S. C. adjudged accordingly.]

[62]

4. Surrender by copyholder to the use of himself for life, then of his son for life, then *the remainder to the use of his last will*. His son dies. The copyholder may again *surrender the estate in fee* if he will, and it will pass by such surrender; per *Walmley and Anderson J. sed adjournatur*. Cro. E. 441. pl. 4. Mich. 37 and 38 Eliz. C. B. *Fitch v. Hockley*.

For the fee-simple of the copyhold being limited to the use of his will, remained in the copyholder, and

not in the lord. 4 Rep. 23. a. pl. 6. S. C. adjudged.

5. *Tenant for life, remainder in fee*; tenant for life was admitted; the *remainder-man* surrendered to J. S. in fee, living the tenant for life, and held good, though not actually admitted. Cro. E. 504. pl. 29. Mich. 38 and 39 Eliz. B. R. *Gypin*, als. *Keppin v. Bunney*.

Mo. 465. pl. 658. *Tiping v. Burning*. S. C. adjudged, because in this case the Ld.

is not to have a new fine on the death of his tenant for life, but where the lord is to have a fine there must be a new admittance.—Goldsb. 95. pl. 9. *Kipping's Case* S. C. argued.—Cro. J. 31. *Auncelm v. Auncelm*, for the admittance of tenant for life was the admittance of him in remainder, and both make but one estate.

6. A copyholder in fee 15 Feb. made a lease for years by licence, which lease was to commence at Mich. following. The lessee entered, and was possessed before the May following, and afterwards, viz. 8 May, the copyholder surrendered, the reversion to divers uses. Resolved, that the entry was a disseisin, and so the grant of the reversion not good. Lit. Rep. 17, 18. Hill. 2 Car. C. B. *Selby v. Berke*.

S. C. cited Gilb. Treat. of Ten 249. cites S. C. that it was a disseisin, and so it seems that the surrender was void.

7. A surrender by a copyholder, who is ousted of the possession, during the ouster passes nothing; yet no disseisin could be because the freehold was in the king, who cannot be disseised, and if the surrenderor enters afterwards, his estate is regained. Clayt, 1, Aug. 7. *Nelson v. Rennington*.

So of a surrender by remainder-man for life, during his ouster of copyholder for life; for

by his entry he is a disseissor, and has no customary estate in him whereof to make a surrender. Mod. 199. pl. 31. Pasch. 27. Car. 2. C. B. *Bird v. Kirk*.—Cart 327. S. C. but no judgment as to this point.—If tenant by copy in possession be disseised the reversion also is turned to a right, and then a surrender is not good. 2 Jo. 154. Pasch. 33 Car. 2 B. R. in case of *Pitt v. Moor*.

8. In ejectments the lessor of the plaintiff claimed under a surrender made by W. Kirby, who had an estate in land after the death of his father, but entered during his life, and thereby became a disseisor, and this estate being now turned into a right, he made a surrender to the lessor of the plaintiff, which being

Cart. 238. *Bird v. Kirby*. S. C.

being found by special verdict; it was adjudged the surrender was void; it was pretended at the trial, that the father, who was tenant for life, had suffered a common recovery in the lord's court, and so his estate was forfeited, for which the son may enter, and then his surrender is good; but per Cur. without a particular custom for that purpose the suffering a recovery is no forfeiture; but if it was, then the lord is to enter, and none else can, and so judgment was given for the defendant. 2 Mod. 32. Pasch. 22 Car. 2. C. B. Kren. v. Kirby.

9. A copyhold is granted in *reversion after 2 lives*, habend. post mortem, sursum-redditionem &c. of the tenants for life; the *tenants for life* sell their estate to A. and *surrender to the lord to the end that he may admit A. the vendee*; the copyholder in *reversion enters and brings an ejectment, and recovers at law*; A. brings his bill, and has relief, because the surrender being only to admit A. the purchaser, it was against conscience that the reverfioner should enter. 2 Freem. Rep. 118. pl. 134. Mich. 1691. Anon.

[63] (Q. a) Surrender. Good in respect of the Manner of the Surrender.

Gilb. Treat. of Ten. 283. cites S. C. for if livery be not made only an estate at will passes, and an estate at will cannot merge an estate at will.

1. IF the lord makes a lease for life to the copyholder by parol, this determines the copyhold, if livery be made, but otherwise if it is by deed only; per Hyde and Jones. But by Jones, if it be a lease for life, the copyhold is gone without livery upon it; quod non fuit negatum. Lat. 213. Mich. 3 Car. Anon.

Contra in the case of BEANY V. TURNER in C. B. but upon error in B. R. Twifden J. held it no performance; but Keeling Ch. J. held that it was, but judgment was affirmed on another point. Lev. 293. Trin. 22. Car. 2. — 1 Mod. 62. Turner v. Beany, S. C. and judgment affirmed nisi &c. — Ibid. cites Hill. 21 Car. Treburn v. Purchas, adjudged, that were the agreement was for a surrender generally such a particular surrender is naught.

2. Covenant to make a surrender of copyhold lands to A. and his heirs is not performed by a surrender into the hands of 2 tenants, but it must be an effectual surrender, and it is not so till it is presented in court. Sty. 256. Pasch. 1651. Shann v. Shann. and Ibid. 280. Trin. 1657. B. R. Shan v. Bilby.

3. Special verdict found that surrender was made by A. to the use of B. and his heirs, to the use of such person as A. should name by his last will, this by Twifden is ill, in that no use can be on a use, although it being not executed by statute; but the verdict finding further, that H. nominated by the last will of A. had surrendered unto B. the Court conceived no doubt in the case. Judgment for the plaintiff nisi. Keb. 627. pl. 107. Mich. 15 Car. 2. B. R. Leaper v. Booth.

4. Custom,

4. Custom, that where an estate is granted by copy for 3 lives to A. B. and C. that the *first life named may bar the remainders*, this must be by a surrender according to the custom; for a *surrender by implication* (as A's. joining in a fine with the lord to the use of M. and N.) is not a surrender sufficient to bar the remainders of B. and C. Adjudged in C. B. and affirmed in B. R. 2 Show. 130. pl. 109. Mich. 32 Car. 2. B. R. Zinzan v. Talmash.

Where it is only the estate of himself a small matter would do it, but here are the interests of B. and C. concerned Ibid. 131 S. C.

Razym. 402. S. C. adjudged and affirmed in error. — Jo. 142. S. C. adjudged and judgment affirmed. — Poll. 561 to 572. S. C. argued by Pollexien against the judgment in C. B. but that judgment was affirmed.

(R. a) Surrender. Good. In respect of the Limitation. And where it is in Futuro. And to Persons uncertain.

1. A Surrender of a copyhold in fee *may be for 1000 years*, and it is very good *if the lord will admit*, but if he refuses there is no remedy but in equity, and equity will not compel the lord to admit on such an unreasonable surrender, for the executors shall pay no fine for admittance. Cumb. 445. Trin. 9 W. 3. B. R. Anon.

2. A copyholder in possession surrendered the reversion of [64] his copyhold *post mortem suam to an use &c.* It was adjudged, Cro. E. 29. pl. 1. S. C. that nothing passed thereby. 4 Le. 8. pl. 36. Trin. 29 Eliz. adjudged, Clamp. v. Clamp. that the surrender is

void; for when one is seised in fee he cannot by any matter in fact give away the inheritance after his death, and so leave a particular estate in himself, but peradventure it may be done by matter of record.

3. Replevin; *J. S. and M. his wife copyholders in fee of a house, and 12 acres of the nature of Borough English; J. S. died. M. surviveth, and takes husband J. C. and by him hath issue the plaintiff and defendant. J. C. and M. his wife surrendered the land by the name of the reversion after the death of J. C. and M. his wife, to the use of the plaintiff and his heirs. M. died, and afterwards J. C. died. The defendant, the younger son, enters as heir by the custom; it was the opinion of the Court the surrender was not good by the husband and wife, for the name of a reversion after the death of M. and J. C. for that J. C. had nothing in the land, and it is absurd that J. C. by a mere grant should have an estate for life who had nothing before, and judgment was given for the defendant. Cro. E. 29. pl. 1. Trin. 26 Eliz. B. R. Clampe v. Clampe.* 4 Le. 8. pl. 36. S. C. cited by Coke Ch. J Roll Rep. 138. 254. S. C. cited per eundem. a Bull. 275. — S. C. cited Saund. 151. Arg. — S. C. cited Arg. Show. Parl. Cases 205.

4. *A. a copyholder surrendered to J. S. for life, and afterwards to the right heirs of A. and then he made another surrender of his reversion to the use of W. R. in fee, and died; J. S. and the S. C. but* Supplement to Co. Comp. Cop. 67. f. 1. cites the S. C. but

says quære
—Gilb.
Treat. of
Ten. 256.
cites S. C.
but makes a
quære.

Cro. E. 386.
S. C. but no
judgment
—Gouldsb.
129. pl. 23.
S. C. but S. P. does not appear.

S. C. cited
Gilb. Treat.
of Ten. 246.
and says it
seems that
for the rea-
sons there
before given
it cannot be
compared
to the case
of a feoff-
ment to uses.

the right heir of A. entred; and Coke a counsel argued, that by the first surrender nothing remained in him, but the fee was reserved to his right heirs, and if he had not made the second surrender of the reversion, his right heir would have been in by purchase, and not by descent, and the common difference is, where it is made to the use of the surrenderor himself for life, and afterwards to another in tail, remainder to the right heirs of the surrenderor for life &c. For in the first case his right heir shall be in by descent, and in the other by purchase. 1 Le. 101. Pasch. 30 Eliz. B. R. in case of Allen v. Palmer.

5. Copyholder for years or life surrendered to the use of A. and his heirs &c. adjudged the surrender good, and the use void. Mo. 352, pl. 474. Hill. 36 Eliz. Portman v. Willis.

6. A. surrendered to the use of B. in fee on condition to pay 100 l. to J. S. and on failure, then to the use of W. R. in fee; whether this be good, being a fee upon fee; the court spake not much to it, but recommended the finding it especially, yet Beaumont J. conceived it to be good enough, for it shall be as an use limited on a feoffment, and these uses shall arise out of the first surrender. Cro. E. 361, pl. 22, Mich. 36 & 37 Eliz. C. B. Paulter v. Cornhill.

See Ibid. 245, 246.

7. If I surrender to the use of him that shall be heir to J. S. or to the use of J. S's. next child, or to the use of J. S's. next wife, though at the time of the surrender J. S. had no child or wife, yet afterwards he has a child, or takes a wife, his heir, his child, or his wife may come into the court, and compel the lord to admit according to the surrender. Co. Comp. Cop. 50. f. 35.

[65] 8. So if I surrender to the use of him that shall come next in to Pauls after such an hour; whose fortune soever it is to come first, the lord must admit him, and I shall never avoid it. Co. Comp. Cop. 50. f. 35.

9. The same law is, if I surrender to the use of him that J. S. shall nominate, or that I myself shall nominate to the lord at the next meeting. Co. Comp. Cop. 50. f. 35.

10. Estates of copyholders shall be directed according to the rules of the common law, and therefore a surrender made to take effect after the death of surrenderor is not good, as a freehold cannot begin in futuro or at a day to come. Supplement to Co. Comp. Cop. 69. f. 3.

11. If a copyholder surrenders 2 acres of land into the lord's hands, the one to the use of J. S. and the other to the use of J. N. and does not name in certainty who shall have the one acre, and who shall have the other, the limitation of this use is void for this uncertainty. Calth. Reading, 31.

12. Surrender by A. to have after his death in the use of his child then in ventre sa mere, and if the child die before his full age of 21 years or marriage, then I surrender the said lands to the use of my cousin J. S. his heirs and assigns, this surrender to J. S. is merely void; for he cannot make such a conditional surrender to operate in futuro, and so the infant being born, and dying afterwards, the defendant claiming from the heir at common law to the infant hath good title. Cro. J. 376. pl. 2. Mich. 13 Jac. B. R. Simpson v. Southern.

1 Roll Rep. 109, 137-253. S. C. and the court inclined that if the surrender had been to the use of his will, and by the will the above

estates had been limited, they should be good. — A. was jacens in extremis, and surrendered. Godb. 264. pl. 364. Simpson's Case, S. C. resolved. And that it cannot be good, because it was to commence upon a condition precedent, which was never performed; and therefore the surrender into the hands of the lord was void; for the lord takes only as an instrument to convey the lands to another. — 2 Bullst. 278. &c. S. C. adjudged. — S. C. cited Mar. 178. pl. 236. — Supplement to Co. Comp. Cop. 67. f. 1. cites S. C. — Supplement to Co. Comp. Cop. 81. f. 15. cites S. C. and that the surrender into the hands of the lord is void, because he takes it only as an instrument to convey it over. — Gilb. Treat. of Ten. 244, 245. cites S. C. and says it seems not grounded upon so good reason as the resolution is in Cro. g. For surrenders are not to be construed so favourable as wills, (though Coke says they should be taken according to the intent of the surrenderor) neither is there the same reason; for a man may as well order a surrender in his life-time, according to the rules of law, as he may any deed to pass away a freehold estate, so that the intention of the party hath not so strong an operation in a surrender as in a will, and therefore that reason will not support a fee upon a fee in that case, as it doth in a will. — Gilb. Treat. of Ten. 247. says, that Coke in his Copyholder says, that a man may surrender copyholds immediately to the use of an infant in ventre sa mere, for that a surrender is a thing executory, and nothing vests before admittance; and therefore if there be a person to take at the time of the admittance it is sufficient, which seems to be reasonable, and to carry no inconvenience with it; for it is not like a grant at common law; for there if there be no body to take, the grant is void, because the estate must be somewhere, and the grant puts it out of the grantor; but in case of a surrender there is no inconvenience at all, for the surrenderee hath nothing till admittance, but the estate is in the surrenderor. But then it seems, that if the surrenderee be not in esse before the admittance that the surrender will be void, for it seems to be implied by Lord Coke; for he says, that if at the time of the admittance the grantee be in rerum natura, that will serve, which implies, that the admittance is to be made after the usual manner, not that the admittance time shall be put off till there be such a person, for then it would have been to no purpose to have said, that if there be such a person to take at the time of the admittance &c. for there is no question but that it will serve, if the admittance must be stayed off till there be such a person, and no question but the grantee will be in rerum natura, if the admittance be to be put off, and so he need not have made a question, if he be, &c. and if he never come in esse, then the admittance-time will be eternally put off, the old surrender stand good, and no body be able to dispose of the copyhold estate. — Though at the time of the surrender the grantee is not in esse, or not capable of a surrender, yet if he be in esse, and capable of the time of the admittance, that is sufficient. Co. Comp. Cop. 50. f. 35.

13. If I surrender to the use of B. after my decease it is not good; per Warburton and Daniel. Brownl. 41. Trin. 6. Jac. in case of Durnal v. Giles.

Noy 157. Hill. 5 Jac. C. B. Allen v. Nash, that it is good

though one cannot preserve the same estate to himself; for the estate is in the lord, and the surrenderor shall take the profits during his life, and after the lord must admit B. according to the directions of the surrender. — Brownl. 127. S. C. adjudged that (to the use of the ad son for life) after the death of the tenant and his heirs is not good in a surrender; for though it be good in a will, yet implication in a surrender is not good, and in copyhold cases a surrender to the use &c. is no use, but an explanation how the land shall go. — Clayt. pl. 36. Aug. 1633. before Dampport Ch. B. Holsworth's Case it was held, that such surrender was good by reason of the custom of the manor, (which was Wakefield) but that otherwise it is by the common law. [* 86]

14. A surrender cannot be made to commence at a day to come, any more than a livery; resolved. Godb. 265. pl. 364. Mich. 13 Jac. B. R. in Simpson's Case.

Ibid. cites it as adjudged 23 Eliz. B. R. in Clark's Case.

15. If

S. P. For where the limitation of the use is void the surrender is void. Godb. 165. pl. 364. Mich. 13. Jac. B. R. in Simpson's Cafe.

15. If a copyholder in fee doth surrender his copyhold lands into the hands of the lord, *to the use of himself and his heirs*; resolved, that in that case, because the limitation of the use to him who had it before was void, the surrender thereof to the lord himself was also void. Supplement to Co. Comp. Cop. 67. f. 1. cites Hill. 17 Jac. B. R. Bambridge v. Whitton.

Cro. C. 366. pl. 4. S. C. says it was resolved, that the surrender was good, and the clause being repugnant to the premises shall be rejected as idle and void, and shall not destroy the premises.

16. A. surrenders to the use of B. and C. his sons, and the longest liver of them, and for default of issue of the body of B. then to the youngest son of M. his sister, and says, *this surrender not to take effect till after my death*, these words are void, and contrary to the premises; agreed per tot. Cur. Jo. 342. pl. 1. Trin. 10 Car. B. R. Seagood v. Hone.

— S. C. cited Arg. 5 Mod. 267. — Gilb. Treat. of Ten. 244. cites S. C. and says that this surrender was held to be void to M's. youngest son, because the contingency did not happen in the life of the surrenderor, and a man cannot surrender to take effect after his death; but says, it was not resolved absolutely that a fee cannot be limited on a fee.

Saund 149. S. C. it was argued, that though the estate limited to B. was void, yet the limitation to

17. A copyholder in remainder after an estate for life in B. surrendered to B. for life, (who was copyholder for life before) *the remainder to J. S. and held good by all the justices, præter Twifden.* Sid. 360. pl. 3. Patch. 20 Car. 2. B. R. Wade v. Bache.

J. S. was good, and adjudged that the estate of J. S. was good by way of present estate, but not by way of remainder. — 2 Keb. 341. pl. 12. S. C. adjudged. — Gilb. Treat. of Ten. 249. cites S. C.

If a copyhold be surrendered to the use of J. S. and his heirs until he shall marry A. G. and after the said marriage then to the use of them two in tail special, if after they do marry, then is the surrender to them in tail, and till then to him in fee. Calh. Reading. 31, 32.

18. Copyholders surrenders to the lord, *to the intent that the lord shall admit A. whom he intended to marry, after marriage; until marriage to the use of himself and his heirs, and after marriage to the use of himself and A. in tail*; per tot. cur. it is good enough to limit a remainder upon a contingent fee in copyholds, as in case of mortgages of copyholds, a surrender in futuro is good, for the freehold remains in the lord. Freem. Rep. 267, 268. pl. 293. Hill. 1679. C. B. Bently v. Delamore.

19. A copyholder in remainder surrendered his remainder to the use of the tenant for life, and after his death to the use of himself and his wife &c. and though the limitation for the life of the tenant for life was void, and so by consequence by the common law the remainder would have been void also, yet it was held, that in case of copyhold it should be taken as a mediate settlement upon the husband and wife after the death of the copyholder for life. Lord Raym. Rep. 626. per Turton J. Hill.

12 W. 3. cites Cro. J. 434. 2 Roll. Abr. 67. Brookes v. Brookes, and also 1 Saund. 151. Wade v. Bache.

*[S. a] What passes by the Words of a Surrender.

1. COPYHOLDER surrendered to the use of B. for monies paid, but limited no estate, and there was a custom that the party to whom the surrender was made should have a fee, and adjudged a good custom. Arg. Roll. Rep. 48. cites 6 Eliz. Thettenwell v. Bunney.

2. R. B. surrenders to the use of Margaret and Robert without limiting of any estate; here they had but an estate for lives, for these estates shall be directed according to the rules of law, unless there be a special custom within the manor, as those words, *sibi et suis*, or *sibi et assignatis* &c. may by custom create an estate of inheritance. 4 Rep. 29. a. pl. 18. Mich. 27 & 28 Eliz. Bunting v. Lepingwell.

copyholds to be guided according to the rules of common law, as a necessary consequence upon the customary estates; so that if a surrender be made to the use of one, he has but an estate for life unless there be a custom to the contrary, for by custom a use limited to one & assignatis suis is good to pass a fee; a surrender to one & tribus assignatis suis, adjudged but an estate for life, but in some cases estates in copyhold lands are not guided according to the rules of common law. Gilb. Treat. of Ten. 242, 243. cites 4 Rep. 29. b. Bunting v. Lepingwell.

3. A copyholder surrendered to the use of a stranger for ever; it was made a quære, if an admittance by the lord of the surrenderee be good in fee to him and his heirs, it being by a bare surrender only, but in case of a devise by such words it had been good. Godb. 137. pl. 162. 29 Eliz. B. R. Allen v. Patshall.

4. If a copyholder surrenders to the use of his right heirs, the estate will remain in the lord till the surrenderor dies, for then, and not before, the right heir will be known; per Coke a counsel. Arg. 1. Le. 101. pl. 133. Pasch. 30 Eliz. B. R. Allen v. Palmer.

5. A. a copyholder in fee surrendered to the use of his last will, and devised to B. his wife for life, remainder to C. his son in tail, remainder to D. his son in tail. B. and C. are admitted. B. dies. C. dies without issue. D. is admitted, and C. surrenders to the use of E. the defendant, and dies without issue; per Cur. the heir may enter before admittance, for Wray said, when the surrender is to the use of his last will, this at first is the whole fee, but when he devised the land for life, or in tail, and does not meddle with the reversion, by this the reversion never passed out of him to the lord, but descends to his heir, and he shall have it without any admittance. Cro. E. 148. pl. 17. Mich. 31 & 32 Eliz. B. R. Bullen v. Grant.

S. C. cited 4 Rep. 28. b. in pl. 17. Trin. 33. Eliz. as lately adjudged accordingly. — As well estates as d. scens of

Gilb. Treat. of Ten. 256. 257. cites S. C. and S. P. by Coke, but says quære of this.

Le. 174. pl. 244. S. C. held accordingly. — Supplement to 10. Comp. Cop. 72. f. 7. cites S. C.

Brownl.
178. S. C.
and S. P.
held accord-
ingly.—
Gilb. Treat.
of Ten. 162.
cites S. C.
says, that
though such
interest may
pass by
name of re-
version (for
any other
name to

give it will be hard to find) yet perhaps he hath not in strictness such an estate in him. However that be, it seems the particular tenant holds of the lord; therefore if the tenant in fee of a copyhold surrenders to one for years, it seems to me that the tenant for years shall hold of the lord, for by admittance the lord takes him for his tenant; but if the lease be made by indenture, there it seems he holds of his lessor; for he is not admitted tenant to the lord.

19. A. seised of copyhold land in fee by licence demised the same by indenture to S. the plaintiff for 20 years. A. surrendered the reversion of one moiety to B. to which he was admitted, and then surrendered the reversion of the other moiety to C. who was also admitted. Resolved, that the surrender by the name of a reversion was good in this case, though the lease was not made by surrender, (which had been directly derived, and that according to the custom out of the customary estate) but by indenture; for still it is the lease of the copyholder, and not of the lord; resolved. Hob. 177. pl. 203. Hill. 14 Jac. Swinnerton v. Miller.

20. A feme copyholder in fee came to court, and offered to surrender to J. S. and his heirs, but she desired to retain an estate to herself for life, and the steward entered, that she surrendered the reversion of her copyhold to J. S. after her death, and it was adjudged an ill grant, because there was not any reversion, cited per Harvey J. Hill. 2 Car. C. B. in Case of Selby v. Becke. Litt. Rep. 18. as one Drewell's Case.

There was
a copyhold
messuage
called Symonds to
which divers

lands appertaining, the tenant surrendered the said messuage called Symonds, with the appurtenances, and all his right therein; per tot. cur. nothing shall pass but the house, with the orchards, yards, and curtelage, and garden, by these words (cum pertinentiis) Cro. J. 526. pl. 2. Pasch. 37 Jac. B. R. Smithson v. Cage. — Gilb. Treat. of Ten. 294, 295. cites S. C.

21. Surrender with the appurtenances will pass land: Surrender of a messuage and three acres will pass more acres if divers copies successively have been so; per Harvey. Het. 2. Pasch. 3 Car. C. B. Blackhall v. Thursby.

[70]
Lev. 135.
S. C. no
judgment
was given in
the principal
point, but the cause
was agreed
to be ad-
journed into
the Exche-
quer Cham-
ber, but the
reporter

supposes it was agreed between the parties, for he heard no more of it afterwards. — Sid. 153. pl. 2. S. C. reports that the court held it clear, that devise to an infant when he shall be born, or to a daughter when she shall be married, are good, and the land shall descend to the heir in the mean time. — Keb. 752. pl. 47. S. C. adjournatur. — Ibid. 800. pl. 67. S. C. that the devise was good, and judgment for the plaintiff nisi. — Ibid. 851. pl. 53. S. C. says, that all doubted that the devise was void, and devise to an infant en ventre sa mere has been a wavering point in all ages; adjournatur.

22. A. and his wife tenants for life of a copyhold, remainder to A. in fee surrendered thus, viz. *My lands in H. which were my wife's, and now her's for life, I give to the heirs of the body of my said wife, if that he or they live to 14 years of age, and for want of such heirs then to R. S. and his heirs.* The husband died without issue, the wife married again, and had issue which lived to 14 years of age. The wife died. Quære, if the words of the will will pass any estate to the issue? Court divided. Raym. 162. Mich. 19 Car. 2. B. R. Snow v. Cutler.

(T. a) Where Tenant shall be bound by a voluntary Surrender made out of Court. See (U.)

1. IF a copyholder languishing in extremity surrendereth out of court to the use of his cousin, in consideration of consanguinity, or to the use of his son, in consideration of natural love and affection, and recovereth his health before presentment, this surrender is peradventure revocable or countermandable. Co. Comp. Cop. 51. f. 39. Anon.

S. C. cited Gilb. Treat. of Ten. 270. and observes, that by Lord Coke's saying a surrender out

of court, it seems, that if it were made in court it would not be revocable, for then he shewed a more settled design, and by his saying before presentment, it seems that if it was presented it is not revocable; for then the land is bound.——If a copyholder surrenders in extremis to the use of himself for life &c. if he grows well again, the surrender shall stand, because he has reserved an estate to himself; per Wray Ch. J. Le. 100. pl. 128. Pasch. 30 Eliz. B. R. in case of Romney v. Eve.——Gilb. Treat. of Ten. 270, 271. cites S. C. and says that this seems to warrant the aforesaid opinion of Coke.

2. But if it be granted upon valuable consideration, as for the discharge of debts, or for a sum of money paid, though it be made out of court, yet it is as binding as any surrender whatsoever made in court. Co. Comp. Cop. 51. f. 39. Anon.

[U. a] What shall be said a good Presentment of a Surrender; and at what Time. This in Roll is letter (I) in fol. 501.

[1. CO. 4. Kite and Quinton 25. The custom of the manor was, that a surrender out of court should be presented in court; a copyholder surrenders accordingly upon condition, and this is presented absolutely, and resolved, that the presentment is void.] See (K) pl. 1. S. C. The presentment in all points material must be according to

the tenor of the surrender. Co. Comp. Cop. 51, 52. f. 40.——Gilb. Treat. of Ten. 263. says, that though the presentment be made wrong, yet if admittance be made according to the surrender, the admittance is good.

[2. Co. 4. Bunting 29. b. copyholder in fee surrenders out of court, and dies before it is presented in court, yet the surrender being presented after his death, according to the custom, is good, as is resolved; but if it had not been done according to the custom, it had not been good; and if the tenants by whose hands the surrender was made, die, yet if this upon good proof is presented, it is well enough. Co. Litt. 62.] Mich. 27 & 28 Eliz. the 5th resolution, in the case of Bunting v. Leppingwell—S. C. and S. P. cited 3 Bulst.

215.—S. C. cited Bridgman 51.—If it be presented by any other copyholder at the next court it is well enough, the copyholders who took the same being dead; held per tot. Cur. and cited Bunting's Case. Cro. J. 403. pl. 1. Trin. 14. Jac. B. R. in case of Frosel v. Welsh.——Co. Comp. Cop. 51. f. 40. says the presentment must be made by the same persons that took the surrender.——Gilb. Treat. of Ten. 263. cites Lex. Cust. 137. that a surrender must be presented by the same persons that took it; so says Coke, but that this is not literally true, will appear from what he says in another place, that if he that took the surrender die, yet if presentment be made of it, it is sufficient; and it is said in Lex. Cust. to have been held by Wadham Windham, that if a surrender be made to one tenant, and presented to have been made to another, yet that is nothing to vitiate the surrender; if the surrender be presented by any body, and admittance thereupon
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thereupon made, it seems to be well enough, for it is known that there was a surrender; and if the presentment should be void, yet the admittance is good enough without it.

[3. If there be *two jointenants in fee* of a copyhold, and *one surrenders his part out of court* into the hands of the lord, *to the use of his last will, and after devises it to another in fee*, and dies, and after, at the next court, this is presented, the devisee shall have it; for now by relation the jointure was severed, and the estate of the land bound by the surrender. Mich. 2. 3. Ph. M. B. Constable's Case, cited. Co. Litt. 59. b.

8 Rep. 88. Perryman's Case S. C. and adjudged a reasonable custom. — 2 And. 125. pl. 71. Pereman v. Bower S. C. 4. Within the manor of P. there was a *custom, that if any tenant of the manor aliens lands holden of the manor by writing or feoffment, or deviseth it by his will, or surrenders it into the lord's hands to the use of any other, that such alienation, feoffment, devise, or surrender used, and ought to be presented at some court of the manor there holden within a year after such alienation, feoffment &c.* It was objected it was no good custom; all the Court except Anderson held it to be a good custom, and allowable, and agreeable to law; for it is good reason the lord should know his tenant, for otherwise it may be so secret that the lord or other may not know who is the tenant. Cro. E. 668. pl. 25. Pasch. 41 Eliz. C. B. Parman v. Bowyer.

4 Rep. 29. b. pl. 18. Mich. 27 & 28 Eliz. the 5th resolution in case of Bunting v. Lepingwell. — Gilb. Treat. of Ten. 207. S. P. — Co. Comp. Cop. 51. f. 40. S. P. and that so it must be by the general custom of the realm; but by special custom in some places it will serve at the 2d or 3d court. — Gilb. Treat. of Ten. 264. S. P. and says the reason of this seems to be to prevent disputes; for if an old surrender might be trumped up at any time, it would defeat any after-charges made by him that surrendered, which charges would appear to be good enough, since he is tenant, and continues possession, and the surrender could not be known. But now let but the purchaser stay a court or two, and then he may be sure to know whether there is any incumbrance; for if the surrender is presented, then it appears, and he need not meddle; if it be not presented, he knows it is void, and so may proceed.

6. By the surrender *out of court* the copyhold estate passes to the lord under a *secret condition that it be presented at the next court*, according to the custom of the manor, and therefore if after such a surrender, and before the next court, he that made the surrender dies, yet the surrender stands good, and if it be presented at the next court, *cestuy que use* shall be admitted thereunto. Co. Litt. 62. a.

[W. a] What Entry of the Surrender and Presentment shall be good. [Variance.] This in Roll is letter (K) in fol. 501.

[1. CO. 4. Kite and Quinton 25. A conditional surrender is presented, and the steward in entering thereof omits the condition, yet it is held, that upon sufficient proof thereof, the surrender shall not be avoided, but the roll shall be amended, and the roll shall not conclude the party to give evidence against it.] But if the presentment of the surrender at the next court by the copyhold tenant (who took the same out

of court according to the custom) omits the condition, the presentment is void. Resolved 4 Rep. 25. a. pl. 11. Pasch. 31 Eliz. B. R. the S. C. — Supplement to Co. Comp. Cop. 80. f. 15. cites S. C. — Gilb. Treat. of Ten. 179. cites S. C. — Co. Comp. Cop. 52. f. 40. S. P. — Gilb. Treat. of Ten. 318. cites S. C. that Lord Coke says, that *presentments* of surrenders ought in all material points to ensue and agree with the surrenders themselves, else the surrender, presentment, and admittance thereupon will be void, which seems reasonable; for if the presentment in matter differs from the surrender, the lord hath no sufficient notice of the surrender, and then the admittance upon it must in reason be bad, and not help out the presentment: for if the lord knew the true surrender, perhaps he would never consent to such a surrender; and the true surrender ought to be known; that the lord might know his tenant, and from whom to take his services. The admittance cannot help out, for that was grounded upon the presentment; but if the lord had notice of the true surrender, though the presentment did differ, yet it seems reasonable the admittance should enure; and when a man is admitted, he is in by the surrender; *sed quære*, where it is said that if the presentment differs in points material from the surrender, that there the admittance, presentment, and surrender are all void; it seems this must be understood, if the time for presenting the surrender be past, for if there should be a presentment and admittance made contrary to the surrender, sure this will not make the surrender void before the utmost time allowed by law for the surrender's being presented; for it is no reason to say, that because the presentment is void, that therefore the surrender is void, for the surrender depends not on the presentment, though it may be void, because not presented, but not because ill-presented; so that if after such ill presentment and admittance there should be good presentment and admittance, it seems the surrender, and all the other acts will stand good.

2. *Misentry of the date of the court of the manor shall not prejudice the party.* 1 Le. 289. pl. 395. Trin. 26 Eliz. B. R. *Burgess v. Foster.* For this entry is not matter of record, but is but

an escroll, and on issue joined of the time of the surrender, or of the court, it shall not tried by the Rolls, but by the country. Ibid. — 4 Le. 215. pl. 348. S. C. in totidem verbis. — 4 Rep. 215. pl. 348. S. C. in totidem verbis.

3. Where a surrender was made upon condition, and the steward in the entry omits the condition, yet upon sufficient proof of it the surrender shall not be avoided, but the roll shall be amended, for the roll shall not conclude the party either to plead or give in evidence the truth of the matter. 4 Rep. 25. a. b. pl. 11. Pasch. 31 Eliz. B. R. *Kite v. Quinton.* An entry in the steward's book, and a parol proof by the foreman of jury, admitted as good evidence, that a

some covert surrendered her whole estate, though the surrender on the Roll differed, and was only (as was also the admission) of a moiety. 2. Vern. R. 587. *Hill & Ux. v. Wiggot.*

4. Where the admittance differs from the surrender the estate of the new copyholder shall be guided by the surrender, for after admittance he is in by force of the surrender, as where the surrender was absolute and the admittance is on a condition. Supplement to Co. Comp. Cop. 71. f. 6. and 81. f. 15. cites S. C. — Co.

Comp. Cop. dition. 4 Rep. 28. b. pl. 17. Trin. 33 Eliz. B. R. West-
 62, 53. f. 41. wick v. Wyer.
 cites S. C.

—Roll

Rep. 238. 317. 438. Lane v. Pannel.—*Covenant in a settlement to surrender copyhold lands to the heir males, but the surrender by a mistake was entered on the roll to the use of the heirs general, this surrender was decreed to be vacated, and a new surrender made according to the settlement.* Fin. R. 554. Brend v. Brend.

[73] (X. a) What Effect the Surrender has, where there is no Presentment.

1. IF copyhold lands are surrendered *into the hands* of the lord of the manor, and he in the presence of his tenants, out of the court, grants the same to another, and the *steward entereth the same into the court book, and maketh thereof a copy* to the grantee, and the lord dies before the next court, this is no good copy to hold the land; *but if the same surrender and grant be presented at the next court in the life of the lord, and the grantee admitted tenant, and a copy made to him, this is a good copy.* Calth. Read. 46. 47.

4 Rep. 29.
 b. Bunting
 v. Leping-
 well S. P.

2. If I surrender out of court, and die before presentment, if *presentment be made after my death*, according to the custom, this is sufficient.

3. So if he to whose use the surrender is made dies before the presentment, yet upon presentment made after his death, according to the custom, his heir shall be admitted.

4. And so if I surrender out of the court to the use of one for life, the surrenderor and the lessee for life dies before presentment, yet upon presentment made, he in the remainder shall be admitted.

5. And so if I surrender to 2 jointly, and one dies before presentment, the other shall be admitted to the whole.

6. The same law is, if those, into whose hands the surrender is made, die before the presentment, upon sufficient proof in court that such a surrender was made, the lord shall be compelled to admit accordingly; and if the steward, the bailiff, or the tenants, into whose hands the surrender is made, refuse to present upon a petition, or a bill exhibited in the lord's court, the party grieved shall find remedy. But if the lord will not do him right, he may both sue the lord and him that took the surrender in the Chancery, and shall there find relief. Co Comp. Cop. 52. f. 40. cites 4 Rep. 29. b.

Gro. J. 409.
 pl. 1. Frostell
 v. Welch,
 S. P. and
 seems to be
 S. C. and the
 whole court
 held that by
 the surren-
 der into the
 hands of 2

7. Copyholder in fee surrendered into the hands of 2 tenants according to the custom of the manor, to the use of another and his heirs, to be presented at the next court; *no court was held for 30 years afterwards, within which time the surrenderor, surrenderee, and the 2 tenants all died.* The heir of the surrenderor entered, and made a lease for years according to the custom of the manor. Adjudged that the lease was good. Godb. 268. pl. 372. Mich. 14 Jac. B. R. Anon.

tenants, nothing past until it was presented in court, and that in the interim the interest remained

to him who made the surrender, which interest descended to the heir who is lessor to the plaintiff, and that he well might enter and make the lease (being but a year) without the lord's licence, or without shewing any special custom; and the acceptance of the rent by the hands of *ceffy que use* gives not any interest unto him, until this surrender be presented in court; for the custom is strict, which ought to be observed; but they held, that it was *not of necessity* that the parties who took the surrender should present it; and although they be dead, and the party who made it is dead, yet (as the custom is found) if it be presented by any other copyholder when the next court is held, it is well enough; and he may thereupon be well admitted.——Gilb. Treat. of Ten. 263. cites S. C.——Supplement to Co. Comp. Cop. 69. f. 3. cites S. C. and says it was resolved, that the lease for years was well made, because before such time that the presentment was made in court of the surrender, the interest of the copyholder did remain in the surrenderor, and his right descended unto and upon his heirs and he might take and receive the rents and profits of the lands; for that no person can have a copyhold, or a copyhold estate, but such a person who comes into the same by custom of the manor, viz. by admittance of the lord, which in this case *ceffy que use* did not do.——Bridm. 49. S. C. adjudged.——3 Bull. 214. Rosewell v. Welsh. S. C. adjudged.——Roll. Rep. 415. pl. 3. S. C. adjudged,

8. A surrender is *not effectual* till it is surrendered in court, per Roll Ch. J. Sty. 257. Pasch. 1651, in that of Shann v. Shann.

(Y. a) Want of Presentment Relieved in [74] Equity.

1. A Copyholder on marriage agreed to settle on the wife for life, but did not; after he surrendered by way of mortgage to A, for money lent, and then surrendered to the use of his will, and then by will devised to his wife for life, remainder to his daughter in fee, and dies. A's. surrender was not presented at the next court, but the wife got herself admitted. The wife being in by agreement precedent to the plaintiff's title, the Court would not impeach her estate, but as to the daughter, her's being purely a voluntary estate, it was ordered, that unless she would pay the plaintiff his money, he should hold and enjoy the premises against her. Ch. Cases 170. Trin. 22 Car. 2. Martin v. Seamore.

2. Copyholder in fee surrendered to the use of mortgagee in fee, and became bankrupt before presentment, and there never was any presentment made; per Cowper Chanc. though the surrender was void in law for want of a presentment, and that might be the laches of mortgagee in not procuring it, yet the surrender was a lien, and bound the land in equity, and an assignee of the commissioners of bankruptcy ought not to be in a better case than the bankrupt, who was plainly bound in equity by this defective conveyance. 2 Salk. 449. pl. 2. Mich. 3 Ann. in Canc. Taylor v. Wheeler.

And come
seemable a
reporter,
he became a
trustee for
the pur-
chaser.
Ibid.——
By act of
parliament
confirming
the custom
of the
manor, all

surrenders were to be void if not presented within 12 months after they were made, and in this case more than 4 years passed before it was presented, which was after the copyholder's death; on a bill by the mortgagee against the assignees and the heir, it was decreed by Lord Cowper, that defendants pay the plaintiff his principal, interest, and costs, or to be foreclosed, and the plaintiff to be admitted to hold and enjoy against defendants. 2 Vern. 564. S. C. 11 Nov. 1706.——S. C. cited Wms's. Rep. 280.——S. C. cited 2 Vern. 610.——S. C. cited per Mr. Vernon, Ch. Prec. 524.——S. C. cited Arg. G. Equ. R. 14.

(Z. a) What Effect a Release, or other Deed, will have as to Copyholders.

Supplement to Co. 1. **R**ELLEASE by copyholder to one that *purchased the fee of the lord* extinguishes the copyhold. Le. 102. pl. 145. Pasch. 30 Eliz. B. R. Wakefield's Case. Comp. Cop. 73. f. 8. cites S. C. — Per Anderson contra; but Snagg seemed to think it did. Cro. E. 21. pl. 2. Trin. 25 Eliz. B. Anon. — Release by a copyholder to the lord is good; per Twisden. Keb. 808. in pl. 77. — Gilb. Treat. of Ten. 283. cites S. C.

Supplement to Co. 2. *If a man is admitted to a copyhold, and is a copyholder in possession, so that a release of the customary right may enure to him, and because the lord is thereby at no prejudice, for he has had his fine upon the admittance of the present tenant, and he to whom the release is made is in by title, viz. by the admittance of the lord the release enures by way of extinguishment of the right of the copyholder, and is a bar to him, resolved.* 4 Rep. 25. b. pl. 11. Pasch. 31 Eliz. B. R. in Case of Kite v. Quinton. Comp. Cop. 80. cites S. C. — Gilb. Treat. of Ten. 179. 180. cites S. C. — Co. Litt. 59. 60. a. S. P. accordingly. — S. F. Arg. 2. Browal. 175. — Cro. J. 101. pl. 32. Whitton v. Williams S. P.

[75] 3. *But if copyholder be ousted by one by tort, there his release by deed to the disseisor or other tort-feasor does not transfer any right, nor bar him, first because he has not any customary estate whereupon there lease of the customary right may enure; and 2dly, it will be to the prejudice of the lord; for thereby he will lose his fine and services, and so it is utterly void.* Ibid.

4. *Copyhold interest cannot be transferred by any other assurance than by copy of court roll, according to the custom.* Co. Comp. Cop. 50. f. 36.

Gilb. Treat. of Ten. 293. cites S. C. 5. If I will *exchange* a copyhold with another, I cannot do it by an ordinary exchange at the common law, but we must surrender to each other's use, and the lord admits us accordingly. Co. Comp. Cop. 50. f. 36.

6. If I will *devise* a copyhold, I cannot do it by will at the common law, but I must surrender to the use of my last will and testament, and in my will I must declare my intent. Co. Comp. Cop. 50. f. 36.

Gilb. Treat. of Ten. 293. cites S. C. & S. P. and that no estates can pass by lease and release, though the lease be by surrender; for a release 7. If I am *ousted* by a copyholder, a *release* made to him is *void*, because it would be a prejudice to the lord; and besides, there is no customary right upon which the release may inure; *but a release inuring by the way of extinguishing, where no prejudice accrueeth to the lord, will serve to drown a copyhold right; and therefore if I surrender out of court upon condition to the use of J. S. and the presentment is made absolute in court, and the admittance framed accordingly, this admittance and presentment differing from the effect of the surrender are both*

both void; yet because upon the admittance the lord is satisfied of his fine. and so nothing at all prejudiced, and besides, here is a customary right upon which the lease may be grounded; I may by a release at the common law sufficiently confirm this void estate. And so upon the same reason, *if I am ousted of a copyhold, and the lord admits him*, according to the custom, a release made by me at the common law will extinguish my right; *but if I make a lease for years of a copyhold, I cannot by my release pass my reversion*, because this release inureth by way of enlargement to transfer an interest, and not by way of extinguishment to drown a right; but my way is to surrender my reversion into the hands of the lord, and he to grant it over to the lessee. Co. Comp. Cop. 50. f. 36.

cannot enlarge a copyhold estate.

8. A copyholder *surrendered upon condition*, and afterwards by deed *released the condition*; resolved, that this is good, for a right or condition cannot properly be determined or given by surrender, or otherwise than by release. Cro. J. 36. pl. 11. Trin. 2 Jac. B. R. Hall v. Shadbrook.

Supplement to Co. Comp. Cop. 80. f. 15. cites S. C. — 4 Rep. 25. b. in case of Kite

v. Queinton, S. P. — Co. Litt. 59. a. S. P.

9. If there are *two joint copyholders*, and *one of them releases to the other*, this is good without any surrender or admittance of him to whom the release was made, because the first admittance was of them, and every of them, and the ability to release did arise from the first admittance. Win. 3. Pasch. 19 Jac. Wase v. Petty.

Het. 150. Mich. 5. Car C. B. Mortimer's Case, S. P. agreed accordingly, per Cur. Jo. 41, 42. pl. 2. Beverhasset v. Humberstone, S. C. & S. P. —

10. If a *copyholder releases to the lord*, it extinguishes the copyhold though it be contrary to the nature of a release to give a possession. Hutt. 65. Trin. 19 Jac. in Case of Blemerhasset v. Humberstone.

Win. 66, 67. Pasch. 21 Jac. C. B. Hasset v. Hanfon, S. C.

11. If a man comes into a copyhold tortiously, and is admitted by the lord, and afterwards he makes a lease for 3 lives, which is a forfeiture of his estate, yet if he that has the pure right to the copyhold releases to the wrong-doer, it is good; for till the lord enters he is tenant in fait; per Yelverton; but Walter seemed of another opinion, and therefore the Reporter says quære what benefit he shall have by the release. Brownl. 149, 150. Mich. 19 Jac.

[76] If a copyholder comes to his estate tortiously, (it seems it must be by admittance, else the release will not operate at all) and commits a

forfeiture, and then he that hath right releases to him, this shall hinder the lord's entry, because now he hath, as it were, another estate of which he hath committed no forfeiture; sed quære. Gilb. Treat. of Ten. 233.

If a copyholder be ousted so as the lord of the manor is disseised, and the copyholder releases to the disseisor, nihil operatur. Le. 102. pl. 135. Pasch. 30 Eliz. B. R. Wakeford's Case.

12. Copyholder is ousted, and so the lord disseised, and the copyholder releases all his right to the disseisor, and dies. His heir enters, and brings trespass against the disseisor, who pleads his franktenement, and by the court the release is clearly

4 Rep. 25. b. pl. 11. Pasch. 31 Elis. B. R. Kite v. Quinton,

S. P. resolved, because the disseisor has

no customary estate on which the release of the customary right may enure; and also it will be prejudicial to the lord, who thereby will lose his fine and services.——Gilb. Treat. of Ten. 180. cites S. C.——Le. 102. pl. 135. Pasch. 30 Eliz. B. R. in Wakeford's Case.——Supplement to Co. Comp. Cop. 73. l. 8. cites S. C.——Gilb. Treat. of Ten. 283. cites G. C. & S. P. and says, that the reason of this seems to be, that though a release cannot in its own nature pass away a possession, yet it may amount to a signification of the tenant's mind to hold the land no longer; for a copyholder is a tenant at will, and therefore though the possession be not granted, any thing amounting to a determination of the copyholder's will is sufficient to extinguish his copyhold, but no right to a copyhold estate is extinguished by release, but where the person that hath the copyhold estate comes to it rightfully, because of the prejudice the rightful lord would be at, for in this case he would lose in his damages against the disseisor, the fine due for admittance, and there would be a tenant brought in against his will, and an estate or will, grantable by surrender only, pass by disseisin and release.

13. Release to a tenant in possession by a wrongful title, by a *feme covert in court*, who was examined secretly by the steward, there need no new admittance. 2 Show. 83. pl. 70. Mich. 31 Car. 2. B. R. Stone v. Exton.

(A. b) Pleadings. Surrenders.

Le. 227.
Blagrove v.
Wood S. C.
but adjourned.

1. PLEA in ejectment that the lands were copyhold, and that B. the tenant surrendered them into the hands of A. the steward to the use of C. the defendant, and that C. was accordingly admitted. B. replies, and concludes with *absque hoc* that A. was steward. Held to be no good issue, for it should be *absque hoc* that B. made any surrender. Cro. E. 260. pl. 45. M. 33 and 34 Eliz. B. R. Wood v. Butts.

2. This is the general custom of the realm, that every copyholder may surrender in court; and need not allege any custom therefore. So if out of court he surrender to the lord himself, he need not allege in pleading any custom, but if he surrender out of court into the hands of the lord, by the hands of 2 or 3 *Sc.* copyholders, or by the hands of the bailiff or reeve &c. or of any other, these customs are particular, and therefore he must plead them. C. Litt. 59. a.

[77]
All 68.
S. C. adjudged, and says it was so resolved in B. R. Pasch. 9. Car. in case of Sims v. Lady Smith.——Sty. 107. cites 9 Car. Sims v. Walken.

3. A. covenanted to surrender to B. copyhold land upon request; B. assigned a breach, that he did not surrender it into the hands of two tenants of the manor, this is not sufficient, for he may surrender it into the hands of the lord, or in court, and the surrendering into the hands of two tenants, is only a particular way. Sty. 107. Trin. 24 Car. B. R. Freeborn v. Purchase.

4. In replevin, the defendant made cognizance, for that M. was seised in fee of a close, parcel of the manor of L. which close he demised to R. for 99 years, and being seised of the reversion according to the custom of the manor, (omitting *ad voluntatem domini*) he surrendered it into the hands of the lord according to the

the custom &c. and upon a demurrer it was adjudged, that the cognizance was insufficient; for the alleging that M. was seised in fee secundum consuetudinem manerii, without saying *ad voluntatem domini*, must intend it a freehold, which could not be conveyed by surrender in court and admittance, without a special custom to pass them in that form. 2 Vent. 143. Hill. 1 & 2 W. & M. in C. B. Rogers v. Bradley.

[B. b] Copyhold. *Admittance*. In what Cases the Estate shall be in the [Person who has the Right to be admitted] Tenant before Admittance. This in Roll is letter (M) in fol. 50a.

[1.] If the custom of a manor be, that the wife of every copyholder for life shall have her free-bench of the tenement of her husband, dum casta & sola vixerit after the death of the baron, the law casts the estate upon the wife, so that she shall have the estate before any admittance; and may make a lease for a year as another copyholder may. Tr. 16. Ja. B. R. between * *Jordan and Stone*, agreed per totam Curiam upon evidence at the bar. Hobarts Reports 244. between † *Howard and Bartlet*, per Curiam; and there cited. P. 16 J. || *Rennington's Case* adjudged.] * Hutt. 18. Trin. 6. Jac. S. C. The widow claimed her free bench, and prayed to be admitted, which the steward refused, whereupon she brought an ejectment.

ment, and whether the action lay, she not being admitted (for it was agreed that no fine was due) was the question. Resolved, that her estate arises out of that of her husband's estate, and if her admittance had been necessary, she did all in her power to procure it, and were as estate is created by custom, that shall be an admittance in law.

† Hob. 181. pl. 218. S. C. that this estate is cast upon her and vested by law. — a Roll Rep. 178. Trin. 18. Jac. B. R. *Walter v. Bartleet* S. C. but S. P. does not clearly appear. — Cro. J. 573. *Waldoe v. Bartlett*, S. C. and S. P. seems to be admitted. — Palm. 111. *Waldoe v. Barkley* S. C. and S. P. seems to be admitted.

|| *Noy 29. Rennington v. Cole* S. C. and S. P. adjudged. Because no fine is due to the lord.

2. The heir of a copyholder may enter and have an action of trespass before admittance. A descent shall not bind the heir of a copyholder. He may surrender unto a stranger before admittance. Supplement to Co. Comp. Cop. 71. f. 5. cites 4 Rep. [23. b. Trin. 26 Eliz. B. R.] *Clark v. Pennyfeather*.

3. A copyholder surrendered to the use of J. S. and the lord of the manor, without any reasonable cause, refused to admit him; adjudged that he cannot enter without a special custom to warrant it, for till admittance the surrenderor continues in possession. Cro. E. 349. pl. 25. Mich. 36 & 37 Eliz. *Berry v. Green*.

4. Surrenderer before admittance has neither *jus in re*, nor *ad rem*, nor has he any remedy if the lord refuses to admit; per Holt Ch. J. Show. 87. cites Cro. J. 368. [pl. Pasch. 13 Jac. B. R.] *Ford v. Hoskins*.

resolved accordingly.

5. Custom

Supplement
to Co.
Comp. Cop.

7c. f. 4.
cites S. C.

and says, it
was resolved
in this case,
that he was
not a copy-
holder with-
in the cus-
tom; for by
the admitt-
ance the
surrenderee
hath no pos-
session, and
the heir is
in by de-
scent, and

holds by the copy of his ancestor, and so the cestuy que use is not a perfect nor compleat copyholder, and it may be compared to the case where a man makes a scotment in fee, of lands, and makes livery within the view, it is no perfect livery till he doth enter into the lands, but the scoffor may punish a trespass there done in the interim, for it is but inchoatum until he enter; and so it is in case of a copyholder, the surrender is but quasi inchoatum, as before, till he be admitted to the copyhold.

5. *Custom &c. that a copyholder might surrender out of court into the hands of two customary tenants, to the use of another, and that at the next court the surrenderee used to be admitted; a surrender was made into the hands of the steward out of the court, but the party, to whose use it was made, died before the next court; it was insisted, that he dying before admittance, he cannot be said to be a copyholder within the custom, and by consequence cannot be possessed of the copyhold estate; and if so, then the heir of the surrenderor is in by descent, and shall hold by the copy of his ancestor; Roll Ch. J. said, that this case differs from the case of surrendering into the hands of tenants, for it is into the hands of the steward out of court, which is good, and that the lord's acceptance of his rent is an admission; but Bacon doubted; sed adjournatur. Sty. 145, 146. Mich. 14 Car. Barker v. Denham.*

6. *A surrenderor of copyhold land continues seised till the admittance of the surrenderee, and the person to whose use the surrender is made is not cestuy que use in the mean time, but when admitted he is in by grant from the lord; per Holt Ch. J. Wms's Rep. 17 Hill. 1700. B. R. in Case of Fisher v. Wigg.*

7. In the case of a surrender to the use of A, the lands were found to be surrendered into the hands of the lord himself in full court, and that the lord assessed a fine upon the surrenderee, but never admitted him; adjudged per tot. Cur. that the heir of the surrenderee had no title, for that the title of the surrenderee is wholly by the copy of the court roll made from the entry upon the court roll, which before admittance cannot be; but in case of a descent the heir may surrender before admittance, because he has a title by descent, but the lord in this case shall have a fine. 11 Mod. 73. pl. 4. Pasch. 5 Annæ, B. R. Brown v. Dyer.

[B. b. 2] In what Cases the Estate shall not [be out of Surrender till Presentment, or Admittance of Surrenderee.]

This in Roll
is letter (M)
pl. 2. in fol.
502.

[1.] IF by the custom of the manor the copyhold ought to descend to the youngest son, and the copyholder in fee surrenders it to the use of himself and his heirs, and dies before any admittance upon the surrender, and the youngest son first enters, the eldest cannot justify his entry upon him before admittance. M. 10 Ja. B. R. adjudged.]

2. If

[2. If a copyholder surrenders out of court into the hands of tenants, according to custom, to the use of another; before this surrender is presented at the next court, or any admittance of him to whose use this surrender is made, the estate continues in the surrenderor. Mich. 14 Ja. B. R. between *Froswell and Welfsh*, per Curiam.]

This in Roll is letter (M) pl. 3. — Bridgm. 49. *Frosett v. Walfshe* S. C. and Croke, Doderidge.

and Haughton J. agreed the S. P. — 3 Bulst. 214. S. C. adjudged. — Godb. 268. pl. 373. S. C. adjudged, that a lease made by the heir of the surrenderor was good. — Cro. J. 403. pl. 1. S. C. adjudged. — S. C. cited Bridgm. 83, 84. — S. P. admitted, Arg. Sty. 146.

[3. But in that case, if the lord admits cestuy que use for his tenant, and accepts the rent from him as his tenant, the estate shall be in him, before any presentment of the said surrender at the next court by the tenants, because the lord is not at any prejudice by this, being satisfied his duties, which is the cause, that the estate is not in the cestuy que use upon a surrender before admittance. Mich. 14 Ja. B. R. between *Froswell and Welfsh*, per Curiam.]

This in Roll is (M) pl. 4. — It seems that the words (and accepts) should be (by acceptance of.) — Godb. 268. pl. 373. S. C. agreed.

that if the lord takes knowledge of the surrender, and accepts the customary rent as rent due from the tenant being admitted, this shall amount to an admittance; but otherwise if he accepts it as a duty generally. — 3 Bulst. 214 &c. *Roswell v. Welfshe* S. C. and S. P. admitted. — Roll Rep. 415. 4. 6. S. C. and S. P. by Haughton J. accordingly, but Doderidge and Croke e contra. — Bridgm. 51. S. C. and S. P. by Haughton J. but the others contra. — Cro. J. 403, pl. 1. S. C. adjudged for the heir of surrenderor. — Supplement to Co. Comp. Cop. 69. l. 3. cites S. C. says it was doubted by the justices, but not resolved whether the acceptance of the rent by the lord at the hands of the cestuy que use did amount to an admittance or not. — S. P. admitted, arg. 2 Sid. 61. — Gilb. Treat. of Ten. 266. cites the same cases, and says, if we look into the reason of the thing, we may conclude, that any thing that expresses the lord's consent to the surrender, should amount to an admittance; for it is his consent only that is requisite after the surrender, to make the surrenderee a tenant; and what matter is it whether that be done by a dominus concessit & admissus est, or by any act that amounts to as much?

4. If a copyholder surrenders his land to the use of J. S. and the lord grants the same to J. S. accordingly, and thereupon he enters, yet he is no good copyholder till he be admitted, but if J. S. appears at the lord's court, and passes on the lord's homage, or the lord accepts his rent or his fine for the same copyhold, then he is become a good copyholder without any further admission. Calth. Reading 63.

(C. b) In whom the Estate shall be said to be before Admittance of Surrenderee, and whether, when admitted, he shall be said in by the Lord or by Surrenderor.

1. **W**HEN a copyholder surrenders to the use of another, and the lord admits him, he is in by the surrenderor. Resolved. 4 Rep. 27. b. pl. 15 Trin. 26 Eliz. B. R. Taverner. v. Cromwell.

Gilb. Treat. of Ten. 241. cites S. C. and says, that this being spoke so

generally cannot by any fair construction but extend to all surrenders, either by tenant for life or in fee; but that in the case of *KING v. LORD [LORDS]* it is adjudged. that if a copyholder for life

life surrenders to the use of another for life, who is accordingly admitted, that he is in from the lord, and not from the surrenderor; [See [P. 5] pl. 3. and the notes there] but Ld. Ch. B. Gilbert says, quære well of this matter; for the tenant for life has not such an estate as to be allowed to grant for life to another; but when a copyholder in fee surrenders to the use of another for life, he is in quasi by the copyholder; this is against Lord Coke, and, as it seems, against reason, for the lord is but an instrument to convey, therefore he is compellable to grant accordingly to the surrender, and no charge by him, while it is in his hands, shall be of any force, and he that surrendered shall pay the services, and the words of Coke are general, that he shall be in by the copyholder in admittances upon surrender; yet Coke says in another place, that by the surrender to the lord out of court the estate passeth to the lord under a secret condition, that it be presented at next court; but it hath been adjudged since, that by surrender to the lord by the hands of two tenants nothing passed, but the interest remained in him that made the surrender, and there can be no difference where the lord takes himself by the hands of two tenants, and if it be in the lord, how can the copyholder pay the services, or take the profits after surrender, or make another surrender?

This in Roll
is letter (N)
Fol. 502.

[D. b] *What Persons may enter before Admittance, and how they shall be seised of it, and in what Manner it shall descend.*

Mich. 23
& 24 Eliz.
C. B. the 3d
resolution.

—Adjudged

accordingly, and that he may bring trespass before admittance. 4 Rep. 23 b. pl. 7. Trin. 26 Eliz. B. R. the 1st resolution in case of Clarke v. Pennyfeather. —Noy. 172. Simpson v. Gibliar. 6. P. Arg. and the better opinion of the court seemed to be so. —Lane 20. Pasch. 4 Jac. in the Exchequer, S. P. admitted by all the barons.

Mo. 125. pl.
272. Rot.
1229. Trin.
23 Eliz.

[2. Co. 4. Browne 22. [b.] adjudged, that there shall be a *possessio fratris* before admittance.]
Anon. seems to be S. C. the copyholder had granted a lease for 12 years by licence rendering rent, and died, leaving a son of two months old and a daughter by one Venter, and a daughter by another Venter. The death of the father was presented, and that the son is heir, and his age. Afterwards the son, (before any rent day incurred, or any admittance to the copyhold, for any guardian assigned) died. Adjudged that the eldest * daughter is sole heir, and that the descent of the reversion upon the lease for years before day of payment of the rent is *possessio fratris quæ facit sororem esse hæredem*. —Co. Comp. Cop. 53. f. 41. S. P. and cites S. C. But if the lease had been determined living the son by the first Venter, and afterwards he had died before any actual entry made, the law would have fallen out otherwise, because there was a time when he might have lawfully entered. —4 Rep. 21. pl. 1. Browne's Case says, that the copyholder had issue a son and a daughter by one Venter, and a son by another Venter, and died, and then the eldest son died before admittance, and adjudged that the land shall descend to the daughter of the whole blood. —[And it seems that the case in Moor as above is misprinted in the stating of it.] —Co. Comp. Cop. 51. f. 41. and Supplement 71. f. 2. cites S. C. according to 4 Rep. ut supra.

* The possession of the termor shall be the possession of the heir. D. 291. b. Marg. pl. 69. cites it as adjudged 23 Eliz. Rot. 1229. Holmes v. Facie.

In what
cases there
shall be a
possessio
fratris. See
more at
[C. e] *Infra*.

[3. D. 12 El. 291. 69. accordingly by two justices, and there also it was held by two justices, that where, after the death of the father, the copyhold descends to the son, within age, and the custody of the land is committed to his mother by the lord during his nonage, who enters, and after the son dies before any admittance, yet this possession of the mother, as guardian, gives the actual possession to the son, and therefore his sister of the half blood cannot be heir to him.]

4. R. B.

4. R. B. surrendered to the use of himself and his wife M. without limiting any estate, if the lord makes admittance to M. and R. and to the heirs of R. this is but an admittance to them for their lives, the reversion over to R. B. and the reversion doth not remain in the lord, the surrender into his hands is general. 4 Rep. 29. b. pl. 18. the third Resolution in Case of Bunting v. Lepingwell.

made the surrender, and not by the lord.

5. Copyholder in fee having issue two sons, R. and T. surrendered his lands to the use of R. for life, and afterwards to the use of T. in fee, both the sons T. being within age, surrendered the lands to the use of W. in fee, who was admitted. R. and T. died, but T. left issue A. who was admitted, and entered upon W. the surrenderee; and it was adjudged lawful, and that he should not be put to his plaint in the nature of a dum fuit infra ætatem. Le. 95. pl. 124. Hill. 30 Eliz. B. R. Knight v. Footman.

fact and no higher, and may bring trespass before admittance.

6. Though the heir be not admitted, yet he may enter and take the profits, and make a lease according to the custom, or bring an action of trespass against him that disturbs him; but if the lord require his fine or his services, and the heir refused to do them, this may be a forfeiture of his copyhold, but until lawful seisin made by the lord (because it belongeth to him) the heir may intermeddle with the possession, albeit he be not admitted by the lord where it is an estate of inheritance by the custom. Poph. 39. Hill. 36 Eliz. B. R. Bullock v. Dibley.

admittance; but if the copyholder had descended to the heir he might have an action before admittance. Lane 20. Pasch. 4 Jac. in the Exchequer, Anon.

7. A copyhold was granted to A. and his wife and their heirs. A. dies. The wife dies. The lord admits a stranger. The heir of the wife enters and brought trespass against the stranger, and held good without admission. Noy. 172. Simson v. Gillion.

8. If copyholder surrenders to B. and the steward will not admit him, and B. enters and occupies the land, and the lord brings ejectment, B. though not admitted, may plead Not Guilty, and shall have a verdict, *quære rationem*, for in respect of the possession it seems the lord's title is eldest; for his title to the freehold is good and lawful, and consequently to the profits of the freehold, unless another can make title to the profits which in this case seems difficult without an admittance. Quære if the reason is not that the lord is *particeps criminis* supposing him not to suffer the steward to admit B. Yelv. 16. Mich. 44 & 45 Eliz. B. R. Arnold v. George.

the lord would not suffer the steward to admit him. [And lord Coke makes no quære of

Supplement to Co. Comp. Cop. 72. l. 6. cites S. C. for after the admittance they are in him who
[81]
Cro. E. 690. pl. 17. Knight v. Fortipan. S. C. adjudged the entry lawful; for a surrender is but a conveyance by matter of
It was admitted by all the barons, that if a copyholder surrenders to the use of a younger son and dies, this younger son cannot bring an action till
Cro. E. 90. Knight v. Fortipan. S. P.—3 Bull. 216. cites 4 Rep. 23. b. Penryfeather. Supplement to Co. Comp. Cop. 71. l. 5. cites S. C. that it shall be found against the lord because he is *particeps criminis*, because it shall be intended that
of

of it.] — Gilb. Treat. of Ten. 273. cites S. C. and takes notice of a nota there, viz. that the surrender, was but of a copyhold to him, & tribus assignatis suis, so that by his death the estate in the copyhold determined &c. This is a very strange report, for the quæres and reasons of the case confound it, and the Lord Ch. Baron says, it seems to me, that the reason of the case was, because that after the surrender the estate continued in the surrenderor, and not in the lord; and so the possession of the surrenderee was illegal against the surrenderor; yet it was good against every body else, and so against the lords lessee; for when the lord refuses to admit, the way is to compel him in chancery, and no action upon the case lies against the lord for non admittance. It is said in Lex Cust. 158. that an action lies for the surrenderor; sed quære; indeed the reason given was, because the surrenderee hath no interest which the surrenderor hath. — The lord of a manor has that prerogative in his copyholds, that no stranger can be his tenant thereof, without his special assent, and admission, and for that cause a copyhold shall not be liable to any executions of statutes or recognizances, neither shall he be affected in debt or formedon, neither is contained in any of the statutes aforesaid; for if it were, then should the lord be forced to have a copyholder whether he will or no, which is against the nature of a copyhold; and therefore a stranger can never enter though a surrender made to his use be accepted, except he be admitted tenant, but otherwise of the heir, for he may enter and take the profits before the admittance after the death of his father. Calth. Reading, 61, 62.

[82] 9. Lord of a manor seises a copyhold without cause, and grants it to J. S. in fee. J. S. died seised, and his heir is admitted.

Supplement to Co.

Comp. Cop.

71. f. 5.

cites S. C.

The first copyholder dies, and his heir enters and surrenders to the use of a stranger. Resolved, that a descent of a copyhold shall not take away the entry of another copyholder that has right, and that the heir entering without admittance his entry is lawful, and being in, his surrender is good before admittance. Cro. J. 36. pl. 10. Trin. 2 Jac. B. R. Joyner v. Lambert.

10. These admittances upon surrender differ from admittances upon descents in this, that in admittances upon surrender nothing is vested in the grantee before admittance, no more than in the voluntary admittances; but in admittances upon descents the heir is tenant by copy immediately upon the death of his ancestor, not to all intents and purposes, for perhaps he cannot be sworn of the homage before, neither can he maintain a plaint in the nature of an assise in the lord's court before, because till then he is not compleat tenant to the lord, no farther forth than the lord pleases to allow him for his tenant. Co. Comp. Cop. 53. f. 41.

11. And therefore if there be grandfather, father, and son, and the grandfather is admitted, and dies, and the father enters, and dies before admittance, the son shall have a plaint in the nature of a writ of aiel, and not an assise of mortdancester; so that to all intents and purposes the heir, till admittance, is not compleat tenant, yet to most intents, especially as to strangers, the law takes notice of him as of a perfect tenant of the land instantly upon the death of his ancestor, for he may enter into the land before admittance, takes the profits, punish any trespass done upon the ground, surrender into the hands of the lord to whose use he pleases, satisfying the lord his fine due upon the descent, and by estoppel he may prejudice himself of his inheritance. Co. Comp. Cop. 53. f. 41.

3 Le. 327.
in case of
Glover v.
Cope —
Le. 100.

12. The heir may recover in ejectment upon his ancestor's admittance. Vern. R. 392. pl. 364. Hill. 1685. in Case of Dancer v. Evett.

Rumney v. Eve. — N. Ch. R. 107. Arg.

[E. b] *What shall be said an Admittance.*

This in Roll is letter (X) in fol. 595.

- [1.] If a copyholder in fee surrenders to the use of another, and after, at another court *cestuy a que use* the surrender was, surrenders the land to the use of another, this shall enure as an admittance upon the first surrender, and after as a surrender; for by the acceptance of the surrender he is admitted to be tenant. Dubitatur, 38. 39 Eliz. B. R. between * *Kepling and Bunning*, Pasch. 41 Eliz. B. R. in † *Calchin's Case*.]

* Cro. E. 504, pl. 29. Mich. 38 & 39 Eliz. B. R. Gyp-pin v. Bunney, S. C. the surrender in this case was

made by a remainderman in fee, where the tenant for life had been admitted; and Popham said, that tenant for life and he in remainder have but one estate in law, and therefore the admittance of the one shall serve for the other; to which Fenner J. agreed; but because the other justices were absent it was adjourned.—Mo. 465. pl. 658. *Typing v. Bunning*, S. C. adjudged, that the admittance of tenant for life is the admittance of him in remainder.—Goldsb. 95. pl. 9. S. C. & S. P. argued.—S. P. resolved. Mo. 358. pl. 488. *Trin. 36 Eliz. Dell v. Higden*.—See [P. b] pl. 1. and the notes there.

† Cro. E. 662. pl. 11. S. C. but S. P. does not appear.

[83]

- [2. If a copyholder surrenders to the use of another, and after the lord having notice thereof, accepts the rent from *cestuy que use out of court*, this is an admittance in law. Mich. 14 Ja. B. R. between *Froswell and Welsh*, per Curiam.]

Gilb. Treat. of Ten. 266. cites S. C. and the case above (pl. 1.) and says,

that by the same reason that the acceptance of a surrender before admittance amounts to an admittance, the admittance of such a surrenderee is a good admittance of the first surrenderee.—See [B. b. 2] pl. 3. S. C. and the notes there.

3. If a surrender be of a copyhold to J. S. and before admittance J. S. doth surrender the land to W. R. who is admitted, yet nothing passeth to W. R. by this admittance. Resolved; for J. S. had nothing, and the admittance of W. R. shall not be taken by implication to be the admittance of himself. Yelv. 145. Mich. 6 Jac. B. R. *Wilson v. Weddall*.

Brownl. 148 S. C. adjudged, but it seems to be only a translation of Yelv. —Supplement to

Co. Comp. Cop. 70. f. 4. cites S. C. —Gilb. Treat. of Ten. 259. cites S. C. accordingly. —If a copyholder surrenders his estate to the use of J. S. who surrenders the same to J. N. and the lord admits J. N. this is good, for the acceptance of the surrender of J. S. in law an admittance of him; per Haughton J. 3 Bullf. 232. Mich. 14 Jac. in case of *Elkin v. Wastall*. But *Doderidge J. contra*.—3 Bullf. 237. &c. Mich. 14 Jac. *Rawlinson v. Greaves*, S. P. dubitatur.

4. When the heir of a copyholder is to be admitted, the words *amissus est* are only used, and not the words *dominus concessit*, which last are the words of grant of the lord used upon every surrender, and the reason is, because the ancestor of the heir had the copyhold estate before. Arg. 3 Bullf. 216. Mich. 14 Jac. in *Case of Roswell v. Welsh*.

5. A copyholder surrendered out of court, according to the custom of the manor, which at the next court was presented, and entry thereof made by the steward, viz. *compertum est per bcnmagium &c. but no admittance*; afterwards *cestuy que use surrenders before admittance*, and the first copyholder surrenders to the plaintiff; Haughton Justice held, that he could not surrender before admittance, and the entry of the surrenderee doth

3 Bullf. 137. S. C. curia advilare vult, and ended by mediation. —Supplement to Co. Comp. Cop. 70. f. 4. cites

S. C. and says, it was the opinion of the court in this case, that none of the colourable things did imply

a perfect admittance to the copyhold; for 1st, the acceptance of the presentment by the steward from the homage was no more than what he was bounden to do, as being judge of the court. 2dly, The entry of it in the Roll was but an office of duty, being but an evidence for the lord, as also for him to whose use the surrender was, and so was the delivery of the copy to J. S. the cesty que use; but none of these things did imply the consent or will of the lord, that the cesty que use should be admitted, or have the lands according to the surrender, and all these things together do not imply any admittance, for all of them may be done, though no admittance be in the case ——— Gilb. Treat. of Ten. 268. cites S. C. and says, the entry of comperturn eff per homagium doth not make an admittance, for that only shews there was a surrender, but implies no assent to the surrender; but the entry of dat domino pro fine & fecit domino fidel. & admisit. that is the admittance. It is said, that in this case the surrender was presented, and the surrenderee accepted, and a copy granted him, and he surrendered again, and this surrender was presented, and a copy granted, and he accepted as a copyholder tenant; in this case nothing is said to be resolved, but the court said, that he to whose use the surrender is made, had not any estate before admittance, but they said nothing to the point, whether he were admitted or not; but it seems, that in that case there is a very good admittance, for he was accepted as tenant, and I should think it was that made him tenant, and not the entry of it in the Roll.

Sty. 146.

S. P. by Roll Ch. J.

— If the lord receives rent, or takes a fine before admittance,

quære if this will not amount to an admittance. 11 Mod. 70. pl. 7.

6. *Acceptance of rent* by the lord of one to whose use a surrender is made, *as of his tenant* before any presentment of the surrender at the next court, this will vest the estate in the surrenderee; but if the lord accepts the rent *as a duty generally* it is otherwise. Godb. 269. pl. 373. Mich. 14 Jac. C. B. Froswell v. Welsh.

[84] 7. Though the *assessing a fine* be no admittance, yet if the steward *accepts a fine* of him so *assessed*, as of a copyholder, this is a good admittance of him; Arg. 3 Bulst. 239. Mich. 14 Jac.

S. P. per Haughton in case of Elkin v. Wastall 3 Bulst. 239. Mich. 14 Jac.

8. If the lord *saith* to the copyholder you have surrendered to the use of A. *to which surrender I agree*, this is good, and shall make him to be a good copyholder, per Haughton, to which the Court agreed. 3 Bulst. 219. Mich. 14 Jac. in Case of Rosewell v. Welsh.

9. If a copyholder *surrenders* his estate *to the use of J. D.* and the lord *meeting with him saith such a surrender is made to your use, to which I do agree, or am content therewith, and that you shall be my tenant*, these sayings shall amount unto good admittances, and shall make him to be a good copyholder without any other admittance, per tot. Cur. 3 Bulst. 232. Mich. 14 Jac. in Case of Elkin v. Wastell.

10. Winch said, that the *admittance* of the lord, viz. the *lessee of the manor*, amounts to a grant to him who had a title, but it is *otherwise if it is to him who was in by wrong, as by disseisin*, cites 4 Rep. 22. which was granted by all the Court. Win. 67. Pasch. 21 Jac. C. B. in Case of Hasset v. Hanson.

11. If a *surrender be to the use of J. S.* and afterwards *J. N. is admitted, the consent of J. S. afterwards* makes this a good admittance; per Glyn Ch. J. 2 Sid. 61. Hill. 1657.

12. A. *purchases a copyhold in his own, his wife, and daughter's names*, and afterwards *surrenders it for the securing a debt to J. S.* J. S. is not intitled to any part of the lands, it being an advancement for the wife and daughter, and the husband and wife taking one moiety thereof by Intireties. Chan. Prec. 1. Hill. 1689. Back v. Andrews.

a Vern. 120. pl. 120. S. C. that a Bill brought by J. S. against the wife and daughter after the husband's

death was dismissed, but without costs.

13. Admittance *by virtue of a forged letter of attorney* in the name of a copyholder to *surrender a copyhold to the use of J. S.* and the attorney surrenders accordingly, whereupon J. S. is admitted, is a void admittance; per Macclesfield C. 2 Wms's. Rep. 77, 78. Trin. 1722. in Case of Hildyard v. S. S. Company and Keate.

[F. b] *What shall be said an Admittance according to a Surrender.*

This in Roll is letter (Q) fol. 503.

[Or rather, How the Lord is considered as to his Power of admitting, and where the Admission is different from the Surrender, How it should operate.]

[1. **THE** lord is but an instrument to admit cestuy que use; for no more passes to the lord than to serve the limitation of the use; and cestuy que use when he is admitted shall be in by him that made the surrender, and not by the lord. Co. Lit. 59. b.]

S. P. and he that is admitted shall not be subjected to the charges of the lord. 4 Rep. 27.

b. in pl. 15; cites is as adjudged Hill. 34 Eliz. C. B. in case of Taverner v. Cromwell.

[2. If a man *surrenders to the use of J. S. and J. D. for their lives, the remainder over to another, and J. S. and J. D. are admitted in fee*, yet this shall not alter their estate, but *they shall be seised according the surrender.* My Reports, 14 Ja. Lane and Pannel adjudged.]

Fol. 504. [85] Roll Rep. 238. pl. 9. S. C. adjournatur.

natur.—Ibid. 317. pl. 28. S. C. adjournatur.—Ibid. 438. pl. 3 S. C. adjudged per tot. cur.—Gillb. Treat. of Ten. 250. cites S. C. and makes large observations thereupon, which see there.

3. If J. *surrender to the use of J. S. for life, and the lord admits him in fee*, an estate for life only passes. Co. Comp. Cop. 53. f. 41. cites 4 Rep. 29. Bunting. v. Lepingwell.

The lord hath only a customary power to make admittances according to the surren-

4. *So if J. surrender without mentioning any certain estate, because by implication of the law estate for life only passes, though the lord admits in fee*, no more does pass than the implication

der, and so far as he executes that power the admittance is good; but where he goes beyond that power he acts without a warrant, and it is void: but if

the surrender be absolute, and the admittance conditional, the admittance is good, and the condition is void; if the surrender be conditional, and the admittance absolute, that is void; if the surrender be to the use of J. S. and the lord admits J. N. this is void, and he may afterwards admit J. S. If he admits J. S. and a stranger, J. S. takes all, for the stranger's admittance is void. The reason of these diversities is, because when the lord acts contrary to his warrant or power, his acts are void, but when he acts according to his power is one thing, but beyond it is another, for what he acts according to his power he hath a warrant, but for what he acts beyond he hath no warrants, and so it is void. Gilb. Treat. of Ten. 180, 181.

cation of law will warrant. Co. Comp. Cop. 53. f. 41. cites 4 Rep. 29. Bunting v. Lepingwell.

5. If J. surrender with the reservation of a rent, and the lord admits, not reserving any rent, or reserving a less rent than J. reserved upon the surrender, this admittance is wholly void. Co. Comp. 53. f. 41. cites 4 Rep. 29. Bunting v. Lepingwell.

6. But if the lord reserves a greater rent, then the reservation is void only for the surplage, and the admittance so far current as it agrees with my surrender. Co. Comp. Cop. 53. f. 41. cites 4. Rep. Bunting v. Lepingwell.

7. If J. surrender upon condition, and the lord admits the condition, the admittance is wholly void; but if my surrender be absolute, and the lord's admittance be conditional, the condition is void, but the admittance in all points else is good. Co. Comp. Cop. 53. f. 41. cites 4 Rep. 25. Kite v. Queinton.

8. A. W. surrenders to the use of W. W. and his heirs; the steward admits W. W. and Joan his wife, and their heirs. The lord here by the custom has but a customary power to make an admittance secundum formam & effectum sursum-redditionis, and this is not like the case of feoffees at the common law, and though the lord grant the estate to another, all this is without warrant, notwithstanding the lord may make an admittance according to the surrender. 4 Rep. 28. b. pl. 17. Trin. 33 Eliz. B. R. Westwick v. Wyer.

9. So if a surrender be to the use of one for life, and the lord admits him to have and to hold to him and his heirs, yet he who is admitted has but an estate for life, and in the case above, the admittance shall enure only to the baron, without an especial custom, or other special matter, which is not in this case. 4 Rep. 28. b. pl. 17. Trin. 33 Eliz. B. R. Westwick v. Wyer.

Supplement
to Co.
Comp. Cop.
71. f. 6.
cites S. C.

10. If a copyholder surrenders to the use of J. S. and the lord after such surrender grants the land to cesty que use and a stranger, all shall enure to cesty que use. 4 Rep. 28. b. Trin. 33 Eliz. B. R. Westwick v. Wyer.

11. The reason of these diversities is these; where an authority is given to any one to execute any act, and he executes it contrary to the effect of his authority, this is utterly void; but if he executes his authority, and withal goes beyond the limits of his warrant, this is void for that part only wherein he exceeds his authority. Co. Comp. Cop. 53. f. 41.

12. Where the lord *admits in another manner than the surrender appoints* it is void. Brownl. 127. Hill. 5 Jac. in Case of Allen v. Nash.

If the copyholder surrenders the land without a condition,

and the lord *admits* the tenant upon a condition, the condition is void; for that after the admittance the surrenderee is in by him that made the surrender, and not by the lord. Supplement to Co. Comp. Cop. 71. f. 6. cites 4 Rep. 32 Eliz. Westwick's Case.

13. Copyholder that comes in by *voluntary grant* shall not be subject to the charges or incumbrances of the lord before the grant. 8. Rep. 63. b. Mich. 6 Jac. in Swayne's Case.

14. A copyholder *surrenders to the use of B. and his heirs. The steward admits him to him, and the heirs of his body.* Notwithstanding this admittance the estate shall be to him and his heirs according to the surrender; per Mountague Ch. J. 3 Bulst. 240. Mich. 14 Jac.

15. The lord of a copyholder is only an instrument to admit the copyholder, and *ought to admit him according to the surrender*, or otherwise the admittance is not good. Sty. 462. Mich. 1655. B. R. Hether v. Bowman.

16. If a *surrender be to the use of J. S. and J. N. is admitted, and J. S. consents*, this is a good admittance; per Glin. Ch. J. 2 Sid. 61. Hill. 1657. in Case of Blunt v. Clark.

Gilb. Treat. of Ten. 269. cites S. C. but says quære of this.

17. It seems that the *presentment* of a surrender in court is *only by way of instruction to let the lord know of the surrender*, and accordingly he may admit, for it is apparent that a presentment is not of necessity, because the lord may admit out of court, and *any act of the lord's consenting to the surrender will amount to an admittance*, which plainly shews that a presentment is only to shew there was such a surrender; for if it were of necessity, then there could be no admittance out of court, nor any act implying the lord's consent would be tantamount to an admittance; and then if we go to the reason of the thing, since the estate is only to be surrendered to the lord, and by him transferred to the surrenderee, if he accept the surrender, and grants an admittance, which is all that can be done, what need is there of a presentment, and of what use can it be, for the homage to present a surrender, in order for the lord's admittance, when the lord may take notice that there was such a surrender, accept it, and admit accordingly? The estate, as it was derived from the lord, so it must be surrendered to him, and the presentment makes no part either of the surrender or admittance; in itself it is nothing but a notification that there was such a surrender, which if the lord takes notice of without a presentment, it frustrates the end of a presentment, and the presentment is no ways of use; therefore it seems, that if a surrender be made, and then a wrong presentment be made of this surrender, and then admittance is made according to the surrender, that this is good; for only the presentment can be void, and then there is an admittance upon a surrender without any presentment, which for the reasons before seems to be very good. Gilb. Treat. of Ten. 262, 263.

See (M. b)
per tot.

(G. b) In what Cases an Admittance is Necessary. And the Effect thereof.

Gilb. Treat.
of Ten. 272.
cites S. C.
Ibid. 316.
cites S. C.

1. **D.** A copyholder having a son about five years old, surrendered &c. that the lord might grant de novo to the use of himself for life, and afterwards to the use of his wife, during the nonage of his son, and afterwards to his son in tail. D. soon after died, before he was admitted, but his widow was admitted accordingly, and married again. It was held, that the second husband should have the lands during the infancy of the son, and need not be admitted, for he is not in of any new estate but in the estate of his wife as assignee. 3 Le. 9. pl. 22. 7 Eliz. C. B. Dedicot's Case.

4 Le. 118.
pl. 236.
Arg. cites
3 C.

2. If a copyholder surrenders to the use of another for years, and the lessee dies, his executors shall have the residue of the term without any admittance; Arg. Le. 4. pl. 8. cites it as adjudged, 8 Eliz. C. B.

3. Where a customary estate descends to the heir he may enter before admittance and take the profits, and he may surrender to the use of another before admittance, but not to prejudice the lord of his fine due by the custom upon the descent. Resolved. 4 Rep. 22. b. Mich. 23 & 24 Eliz. C. B. the 3d resolution in Browne's Case.

4 Le. 208.
209. pl. 257.
Beale v.
Langley
& C.

4. Lord of a manor of which Bl. Acre is held by B. by copy in fee, according to the custom, made feoffment of Bl. Acre to J. S. The copyholder dies. Though J. S. has not any court, so that the heir cannot be admitted, nor the death of his ancestor presented, because *but one tenant*, yet per Cur. the copy shall bind J. S. and the ceremony of admittance is not necessary in this case. 4 Le. 230. pl. 364. Mich. 29 Eliz. C. B. Bell v. Langley.

5. Surrender is but a conveyance by matter of fact and no higher; so that if an infant copyholder surrenders and dies, his heir may enter and bring trespass before admittance. Cro. E. 90. pl. 17. Hill. 30 Eliz. B. R. Knight v. Fortipan.

6. If the death of the ancestor be not presented, nor proclamation made, the heir is at no mischief, though he comes not to be admitted, notwithstanding his being of full age. Le. 100. pl. 128. Pasch. 30 Eliz. B. R. in Case of Rumney v. Eve.

4 Le. 30.
pl. 84. S. C.
in totidem
verbis.

7. If a copyholder dies, his heir within age, he is not bound to come to any court during his nonage to pray admittance. 3 Le. 221. pl. 294. Pasch. 30 Eliz. B. R. Anderson v. Hayward.

4 Le. 30.
pl. 84. S. C.
in totidem
verbis.

8. If the death of the ancestor be not presented, nor proclamation made, the heir is not at any mischief if he does not come in and pray admittance, although he be of full age. 3 Le. 221. pl. 294. Pasch. 30 Eliz. B. R. Anderson v. Hayward.

9. *Cestuy que use* shall not enter nor have action before admittance, *unless there be a special custom for it*. But till his admittance the surrenderor may have action of trespass against any who enters. Cro. E. 349. pl. 25. Mich. 36 & 37 Eliz. B. R. Berry v. Green.

Gilb. Treat. of Ten. 273. cites S. C. — Supplement to Co. Comp. Cop. 72. f.

6. S. P. as to the entry cites S. C.

10. A surrender of a copyhold was to *A. & tribus assignatis suis*; by the death of A. the estate in the copyhold was determined, and he to whom the surrender was intended had nothing in interest, nor otherwise by course of the law before admittance. Yelv. 16. Mich. 44 & 45 Eliz. B. R. in a nota there, at the end of the Case of Arnold v. George.

11. If a copyholder will *surrender to the use of the lord*, the interest of the copyhold is sufficiently vested in the lord immediately upon the surrender, without any admittance of the lord, because the lord cannot admit himself. Co. Comp. Cop. 51. f. 38. [88]

12. If the lord will make a *voluntary grant of a copyhold* no surrender is requisite, for by the admittance of the lord according to the custom the copyholder is sufficiently settled in his land without any other ceremony. Co. Comp. Cop. 51. f. 38.

13. If a copyholder will *surrender in court to the use of a stranger*, besides the surrender the admittance is requisite; and if the surrender be made *out of court into the hands of the lord himself*, which the general custom will warrant, or into the hands of the bailiff, or two tenants of the manor which by special custom only is warrantable; besides a surrender, two other ceremonies are requisite, the one a true presentment of the surrender in court by the same persons into whose hands the surrender was made, the other is an admittance of the lord according to the effect and tenor both of the surrender and presentment. Co. Comp. Cop. 51. f. 38.

14. If the *estate of the lord determines after the surrender* of a copyhold, *before an admittance*, yet the surrenderee shall be admitted; so if a man *surrenders to the use of his last will out of court* according to the custom, and *dies before presentment*, yet at the next court the devisee ought to be admitted. Co. Litt. 59. b.

15. If a woman *intitled to frank-bank* comes into court, and *prays her widow's estate*, and *she is denied* the same, Warburton and Hutton thought *the law would supply the admittance* which was refused to be made to her on her prayer. Hob. 181. pl. 218. in Case of Howard v. Bartlet.

Noy. 29. Hill. 15. Jac. C. B. Rennington and Cole. S. P. adjudged.

16. The lord may *avow upon the heir for rents and services before admittance*, but he is not complete tenant before admittance, for he cannot maintain a plaint in nature of an assise before admittance, but it seems he may have assise of mortdancestor upon his ancestor's admittance. Gilb. Treat. of Ten. 271.

S. P. But if a copyholder having issue two daughters,

and they are admitted, and then the one of them dies, the other must needs be admitted for the other moiety, for she takes the same by descent. Calth. Reading. 64.

17. Two jointenants, the one dieth, the other shall have all by survivor, without paying a fine, or being admitted. Gilb. Treat. of Ten. 316.

18. It was ruled by Holt Ch. J. at Brentwood summer assizes, 10 Will. 3. upon evidence at nisi prius, that if copyhold land be surrendered to the use of a will &c. and afterwards the will devises this land to B. and his heirs, upon condition that he pay 100l. within 6 months after the death of the devisor to J. S. if the money is not paid, J. S. ought to be admitted, then he must make an actual entry before he can surrender; and therefore in the present case, a surrender made by J. S. before actual entry was held ill. Ld. Raym. Rep. 726. Clerke v. How.

[89] 19. A copyholder makes a surrender in court into the hands of the lord, and the lord doth assess a fine, this is no admittance by implication. This surrender was to the use of himself for life, then to his wife for life, and then to them in tail, remainder to the heirs of his body &c. no express admittance was made. The wife enjoys her widow's estate by the custom &c. The eldest son and heir of the body of the surrenderor is admitted generally as heir, but not as to the estate tail; then he makes a mortgage and dies, leaving issue, who is admitted, and the mortgagee recovered in ejectment for the son was admitted to the fee-simple, for the estate in fee and same right remained in him till admittance upon the surrender, for this fee-simple descended upon the death of the father to him, as his eldest son and heir; but had the eldest son and heir been admitted to the estate tail, he could not have made the mortgage. Hill. 5 Ann. B. R.

(H. b) Where the Lord may inforce a Mortgage-Surrenderee to be admitted.

1. **M**ORTGAGE surrender to secure 700l. at 6 month's end was made into the hands of the lord. The money not being paid the mortgagee and mortgager were both willing the money should lie, and desired the lord that the surrender should be taken up, and a new one made for 6 months longer; but he insisted, that the mortgagee should come in and be admitted, and refused to accept a new surrender, and called courts, and made proclamations; but before the third proclamation the copyholder brought a bill against the lord, but the Court would not decree, but to try at law what the custom was. 2 Vern. 368. pl. 330. Mich. 1699. Tredway v. Fotherley.

(I. b)

(I. b) In what Case a New Admittance must be.

1. IF a copyholder be for years and makes his executor, and dies, the executor shall have the term, and that without any new admittance; per Brown and Dyer Justices, but Weston e contra. 3 Le. 9. pl. 22. 7 Eliz. C. B. in Dedicot's Case. Gilb. Treat. of Ten. 273. cites S. C. but says, that the opinion seems
 reasonable; for they continue the possession of the testator, and have it only to his use.

2. Copyholder surrendered to the use of A. for life. A. is admitted and dies; he in reversion may enter without a new admittance; per Wray. Le. 175. pl. 244. Hill. 31 Eliz. B. R. in Case of Bullen v. Grant. Cro. E. 148. pl. 17. S. C. and S. P. held accordingly.—Gilb. Treat. of Ten. 151. cites S. C. but adds a quære.

3. Where the lord is to have a fine there must be a new admittance. Mo. 465. pl. 658. Pasch. 39 Eliz. B. R. Tipling v. Bunning. Cro. E. 504. pl. 29. Gipping v. Bunning S. C. —
 Could sb. 95. pl. 9. Kipping's Case S. C. but S. P. does not clearly appear in either of the said books.

4. If a surrender of a copyhold be made to the use of a stranger for life, and the lord makes a grant thereof to the same stranger in fee, this shall not bind the heir of the tenant, but that he may enter after the death of the grantee, for he took the land by the surrender, and not by the grant made by the lord, for the lord is but an instrument of the conveyance of the land; for if I make a surrender unto the lord *ea intentione* that he shall grant over unto such a man, if the lord will not grant the same, I may then re-enter, but the stranger has no means to enforce the lord to grant the same over unto him, but he may maintain trespass against the lord, if he doth suffer me to re-enter, and this is the opinion at this day. Calth. Reading. 61.

5. In case of a release to a tenant in possession by wrongful title, there needs no new grant or admittance of the lord, and if the right tenant had been admitted, the other had been out; per Cur. 2 Show. 83. pl. 70. Mich. 31 Car. 2. B. R. Stone v. Exton. [90] This was a release in court by a feme covert, who

was examined by the steward privately. Ibid.

6. A copyholder may surrender to the use of another upon condition, that if the surrenderor pay such a sum of money at such a day the surrender to be void; after the admittance of such surrenderee, if the surrenderor pay the money, he may re-enter, and shall have the land without any new admittance, or any new fine, for he is in of his old estate; so he may surrender, reserving rent, and that if the rent be not paid, he may re-enter, and there no fine or admittance is to be had; but in case where the day of payment of money by the surrenderor

Calthrop's Reading 60. 61. S. P.

is past, so that he hath only an equity of redemption, there it seems he must pay a fine, and be re-admitted. Gilb. Treat. of Ten. 59, 263.

This in Roll
is letter (T)
in fol. 504.

[I. b. 2] *What Thing may pass by Admittance.*

[Or rather, How much shall be said to pass by the Surrender and the Effect of an Admittance, though on a void Presentment.]

Ibid. The report says that those general words of per nomen of all his lands &c. were not really in the

[1. D. 8 El. 251, [b. pl.] 92. Barnwell *covenants to assure all his copyhold lands* to A, and after he surrenders out of court, according to the custom, *divers parcels by particular name, the surrender is enrolled accordingly, with a conclusion, by the name of all his copyhold lands there*, per Dier, and alios, no more shall pass by it than what was named in the surrender.]

mote of the surrender taken by the steward, and whether more than is particularly mentioned in the surrender should pass by its being so presented and enrolled was much debated in several courts for 24 years; Dyer held, that no more should pass than the surrender expressed particularly, and a decree was made accordingly by the Lord Wentworth, lord and chancellor of the said manor, unde postea se poenituit. But nevertheless, diverse others agreed to the said opinion for law. — Ibid. Winter v. Jeringham. — S. C. cited Gilb. Treat. of Ten. 238. 239.

[2. Co. 4, Kite and Quinton 25, A man is *admitted upon a void presentment*, yet resolved, that he hath a customary estate in possession, and *is in by title, and capable of a release* from him that hath the right,]

a Roll. Rep. 327. S. C. but S. P. does not appear.

3. Several copyhold lands were appertaining to a messuage, which *messuage, cum pertinentiis*, were surrendered to the lord, and the surrenderee was admitted; all the Court held that it is all one in case of copyhold and freehold, and that *only the messuage, curtilage, orchards, and yards, and garden passed* by this surrender. Cro. J. 526. pl. 2, Pasch, 17 Jac. B. R. Smithson v. Cage.

[91]
This in Roll
is letter (P)
in fol. 503.

[I. b. 3] Copyhold.
Admittance upon a Surrender.
By whom it may be.

4 Rep. 24.
a. pl. 9.
Pasch. 29
Eliz. B. R.
in case of
Rous v. Ar-
tois. —

Mo. 236.

pl. 369. S. C. and S. P. adjudged, and so if the heir before assignment of dower grants and admits to a copyhold upon a surrender thereof, he is only in such case an instrument of conveyance by the surrender, and does not depart with any interest; agreed by all the justices. —

2 Lf.

a Le. 45. pl. 59. S. C. ——— 1 Rep. 140. b. S. P. accordingly by the reporter in a note at the end of Chudleigh's Case. ——— S. P. Arg. 3 Bullt. 215. cites 4 Rep. 24. in case of Clarke v. Pennyfeather. ——— Mo. 112. S. P. per Cur. ——— If a manor be devised to one, and the devise enters and makes copies, and then the devise is found void, yet the copies upon surrenders made by such devisee are good; per Popham. Ow. 28. cites 7 Eliz.

[2. If the disseisor of a manor accepts a surrender of a copyholder of inheritance, to the use of another and his heirs, and he admits *cestuy que use* accordingly, this is good, and shall bind the disseisee. P. 40 El. B. R. between Martin and Rewe. per Popham. Co. 4. 24.]

[3. If a copyholder of inheritance surrenders to the disseisor of the manor, *ut dominus inde faciat voluntatem suam*, and the disseisor at the same court regrants it to the copyholder in tail, with a remainder in fee, or in other manner, according to the intention of the surrender, it seems this shall bind the disseisee; but quære.]

[4. If a copyholder for life, or in tail, surrenders to the disseisor of the manor, to the use of another for life, or in tail, this shall not bind the disseisee. P. 40 El. B. R. in Martin's Case.]

[5. But if A. copyholder for life surrenders to the disseisor of the manor, to the use of another for life of A. and the disseisor admits him accordingly, this shall bind the disseisee. S. P. 4 Rep. 24. a. pl. 7. Ibidem.]

[6. If a copyholder of the inheritance dies, and this descends to his heirs, a tenant at sufferance of the manor, though he hath no lawful estate, may admit the heir, and this shall bind him that hath right. Co. 4. 24. 58. b.]

Pennyfeather S. P. for such acts are within the custom and lawful, et quodam modo judicial, and so do which he may be compelled in a court of equity, and therefore shall bind him, that has the right.

[7. If the lord pro tempore of a copyhold manor be lessee for life, or for years, guardian, or other that hath a particular interest, or tenant at will of a manor, and accepts a surrender, and after before admittance the lessee for life dies, or the years, interest, or custody ended or determined, or the will be determined, though the next lord comes in paramount the lease for life or years, custody, or other particular interest or tenancy at will, yet he shall be compelled to make admittances according to the surrender. 17 Ja. in the Lord Arundel's Case held, cited Co. Lit. 59. b. Tr. 1 Ja. Rot. 854. between Shopland and Ridler, in the Case of a Guardian in Socage adjudged.]

* See (G.) pl. 8 S. C. and the notes there. + See (G.) pl. 4. S. C. and the notes there.

This in Roll is letter (S.) in fol. 504. See (Q. b.) [K. b] What *Admittance* shall be *good*, and by *whom* & c *contra*. And at what *Time*.

See (W. a) pl. 1. S. C. [1. CO. 4. Kite and Quinton 25. it is put, that if a *conditional surrender* be presented &c.]

—Supplement to

Co. Comp. Cop. 80. f. 15. cites S. C. that the surrenderee being dead the lord admitted his heir, but the presentment of the surrender being (as of an absolute, and not as of a conditional surrender) without taking notice of the condition, it was resolved to be void; but if the conditional surrender had been presented it had been good, though it was entered on the Roll.

Adjudged

Ibid.

Hauchett's

Case.

[2. D. 8 El. 251. [a. pl.] 90. A copyhold is *surrendered* to the lord, *ad intentionem* that he shall grant it to him for life, with a remainder over, if the party that surrenders die before execution thereof had, yet the grant of the remainder after by the lord is good.]

[3. Co. 4. Kite and Quinton 25. A copyholder *surrenders* to the use of J. S. in fee; J. S. dies before admittance, and it is admitted, that his heir was well admitted after his death, and the Lord Coke cited the Case, 29. b. That his heir shall be admitted.]

(L. b) Admittance. How it may be.

Cro. J. 434. pl. 1. Brooks v. Brooks S. C. adjudged; and it is said there that in many manors there are no other forms of grant or limitation. —Supplement to Co. Comp. Cop. 71. f. 6. cites S. C. 1. B. A copyholder in fee surrendered to the lord by whom B. was admitted, *habendum* to him and his wife in tail, remainder over; it was agreed per Cur. that this admittance was good to the wife, though she was only named in the habendum, and not in the premises, though it be otherwise in case of feoffment and grant; but this case of copyhold is like the case of a will, or of frank marriage, which will pass the estate, though the party is only named in the *habendum*; and judgment accordingly. Poph. 125, 126. Trin. 15 Jac. B. R., Brook's Case.

—Lord Raym. Rep. 626. Hill. 12 W. 3. Holt Ch. J. cited the case of Brookes in Poph. 125. and the saying of Popham, that the case of a copyhold resembles the case of a will, but says the report of Cro. J. 434. makes no mention of any such thing, and that the said part of Poph. Rep. being reported by an uncertain author ought not to be regarded. —But in Cro. Car. 386. 1 Jones 342. Seagood v. Hone, where a copyholder surrendered to the use of A. and B. and the survivor of them, and for want of issue of the body of B. remainder to J. S. and his heirs; it was held, that B. had only an estate for life; for an estate for life being limited to him by express limitation, he shall have no higher estate by implication, and though perhaps it might have been enlarged by implication in a devise, yet it shall not be so in a surrender or conveyance, which shews the difference between a surrender of a copyhold and a will, and that the surrender is like any other conveyance at common law. Ld. Raym. Rep. 630. Hill. 12 W. 3 per Holt Ch. J. —Gilb. Treat. of Ten. 239. cites Poph. and Cro. J. and says, that the subsequent admittance explains to what use the surrender was made. —Gilb. Treat. of Ten. 243. says, that since the Judges thought that the baron did not take before the habendum any more than the wife, and that this case does not fully prove, that a person may take that is named after the Habendum when there is another only named in the premises, for when both are named in the habendum only, the admittance would be to no purpose, if both could not take; and perhaps at common law, if there be no body named in the premises, habendum to 2, they shall both take, else the deed could have no effect but an admittance to one habendum to him and another, may be good; sed quære.

[M. b]

[M. b] [Admittance] How. [And in what Cases] by Letter of Attorney.

This in Roll is letter (U.)

Fol. 505.

[1. **T**HE lord may refuse to admit by attorney cestuy a que use a surrender of a copyhold is made, because he ought to do fealty, which cannot be done by attorney. Co. 9. Com. Combs's Case. 76.]

Gilb. Treat. of Ten. 202. 203. S. P.— Ibid. 269. S. P.—

A copyholder may take an estate in the copyhold by the surrender of another copyholder into the hands of tenants of the manor by custom, but then this surrender must be presented in court, and he to whose use the surrender was made must personally appear in court, and there be admitted to the land; and he cannot be admitted by attorney Supplement to Co. Comp. Cop. 83. f. 18.—Copyholder ought not to be admitted by letter of attorney, for he ought to do fealty at the time of his admittance, which cannot be done by attorney 2 Chan. Rep. 56. 21 Car. 2. Floyer v. Hedgingham.

[2. [But] if the lord will admit him by attorney it is good. Co. 9. Combe 76.]

Gilb. Treat. of Ten. 236. S. P. admitted, that ad-

mittance by the lord in court and out of court seems to be de communi jure, and therefore it may be done by attorney.

3. A copyholder of the manor of the Earl of Arundell did surrender his customary lands to the use of his last will, and thereby devised the lands to his youngest son and his heirs, and died; the youngest being in prison makes a letter of attorney to one to be admitted to the land in the lord's court in his room, and also after admittance to surrender the same to the use of B. and his heirs to whom he had sold it for the payment of his debts, and Wray was of opinion, that it was a good surrender by attorney, but Gawdy and Clench contrary; and by Gawdy, if he who ought to surrender cannot come in court to surrender in person, the lord of the manor may appoint a special steward to go to the prison and take a surrender &c. Le. 36. pl. 45. Trin. 28 Eliz. B. R. Anon.

Supplement to Co. Comp. Cop. 83. f. 18. cites S. C. and that he should have procured the lord to appoint his steward to have gone to the prison to him to have been admitted, and after-

wards to have surrendered the lands.

4. What persons soever are capable of a grant by copy may well take by attorney, not that the lord shall be enforced to admit any one by attorney, because upon every admittance there is fealty due by the party admitted, which is a duty so inseparably annexed to the persons, that it cannot be discharged by deputy, and therefore no reason the lord should be enforced to admit by attorney; but if it will admit him it stands good. Co. Comp. Cop. 49. f. 35.

5. C. surrendered to the use of J. S. and his heirs upon condition that if C. pay 800l. such a day the surrender to be void. J. S. died before the day without being admitted, his heir being then beyond sea. A neighbour came and was admitted in the name of the heir. This heir returned and consented to the admittance by bringing an action against another, and judgment for the plaintiff; for this is a good admittance. 2 Sid. 61. 62. Hill. 1657. B. R. Blunt v. Clark.

Gilb. Treat. of Ten. 268. 269. cites S. C.

[N. b]

[N. b.] Admittance. At what Place it may be.

This in Roll [1. **THE** lord of the manor may make admittances out of court, is letter (U) and out of the manor also. Co. Lit. 60. b.] pl. 3.

—S. P. resolved, 4 Rep. 26. b. the last resolution in p. 12. Trin. 30 Eliz. B. R. Melwich v. Luter. — Gilb. Treat. of Ten. 203. cites S. C. — Ibid. 301. cites S. C. and says, that this seems to imply, that the lord may make by copy grants and admittances at a court held off the manor, or else, where is the difference between the case of the lord and steward; and in the next case but one it is resolved, that if the steward at a court held off the manor make any grants or admittances, they are all void, but he says nothing of the lord; in his Comment. upon Littleton he says the court baron must be held upon the manor, else it would be void. — S. P. agreed by Cooke, Haughton, and Doderidge. Bridgm. 52. Mich. 14 Jac.

This in Roll [2. The steward of a manor may admit upon a surrender out is letter (U) of court as well as in court. Mich. 14 Ja. B. R. between pl. 4. — Cro. J. 403. *Froswell and Welsh*, per curiam. Contra Co. 4. 26, 27.] pl. 1. S. C.

3 Bull. 214. *Roswell v. Welch*, S. C. — Roll. Rep. 415. pl. 3. S. C. — Bridgm. 49. *Frosett v. Walshe*, S. C. — 3 Bull. 214. S. C. but I do not observe the same point in any of those reports. — The admitting a copyholder is not any judicial act; for there needs not be any of the suitors there who are judges; and * such a court may be holden out of the precinct of the manor, for no pleas are holden; quod fuit concessum per tot. Cur. Le. 289. pl. 394. Trin. 26 Eliz. B. R. in *Ld. Dacres's Case*.

* See the notes at pl. 1. *supra*.

Supplement to Co. Comp. Cop. 69. cites S. C. 3. If the under-steward holds a court baron, and grants customary land by copy of court roll, without authority of the lord or high-steward, this is a good grant. Br. Tenant per Copy. pl. 26. cites H. 2. E. 6.

4. Contra if he does it out of court without such authority. Ibid.

5. But the high steward may admit by copy out of court, by some; *quære* inde; if he has not special authority from the lord to demise. Ibid.

But Gawdy J. doubted thereof, and conceived it had been well enough if it had been so used time out of mind. Ibid.

6. A. had two manors and granted a copyhold of one at the court of the other manor. It was adjudged a void grant; for it cannot be a copyhold according to the custom of a manor whereof it is not parcel; cited per Popham Ch. J. Cro. E. 814. to have been adjudged in Qu. Mary's Time, in *Case of the D. of Suffolk*.

7. A copyhold granted at a court held out of the manor was confirmed against the lord that made it, Toth. 107. 25 Eliz. Marke v. Suliard.

8. Admittance of a copyholder is not any judicial act for there need not be any of the suitors there who are the judges and a court may be held out of the precinct of the manor for no pleas are holden. Le. 289. pl. 394. Trin. 26 Eliz. B. R. in *Lord Dacres's Case*.

Ibid. says, that agreeable to this is the 4th resolution in Melwich's Case [4 Rep. 26. b. pl. 22.] — Gilb. Treat. of Ten. 203. cites S. C. 9. If the steward of a manor holds a court out of it, all the grants and admittances there made are void; for the court of the manor ought to be held within the manor; Resolved per tot. Cur. 4 Rep. 27. a. pl. 14. Mich. 27 & 28 Eliz. B. R. Clifton v. Molineux.

10. But resolved that by custom the court may be held out of the manor, and that grants and admittances made there are well enough; as divers abbots, priors &c. used to hold courts in one manor for diverse several manors, and good by custom. 4 Rep. 27. a. pl. 14. Mich. 27 & 28 Eliz. B. R. Clifton v. Molineux.

Gilb. Treat. of Ten. 203. cites S. C. — S. P. per Cur. Cro. C. 367. at the end of pl. 4.

Trin. 10 Car. B. R.

11. In case of a customary manor where the copyhold tenements are divided from the residue of the manor, the lord or his steward may grant copies out of court as well as in court; per Cur. Cro. E. 103. pl. 10. Trin. 30 Eliz. B. R. in Case of Melwich v. Luter.

Gilb. Treat. of Ten. 203. cites S. C. & S. P. but says quære. — It is held, that if the

inheritance of copyholds be granted to one, he may hold courts where he will, for it is no longer a court baron, and that the lord or his steward may grant copies out of court as well as in court, and as the case is reported by Croke, the grant was at a court held at another manor; but as Coke reports it, though the grant be at another place, yet it is not said to be done at a court; so quære, whether a steward may make grants by copy out of court; but if a steward can, an under-steward cannot. Gilb. Treat. of Ten. 235, 236.

12. The lord himself may make a grant or admittance of a copyhold out of the manor at what place he pleases, but the steward cannot do it at any court holden out of the manor. 4 Rep. 26. b. pl. 12. 30 Eliz. the 4th Resolution, in Case of Melwich v. Luter.

Cro. E. 102. pl. 10. S. C. — As Melwich's Case is reported by Croke, it is there said,

that if the lord grants away the freehold of his copyholds, the grantee may hold courts where he will to make admittances and grants, if then a grant by copy or admittance should be made at a court held off the manor, though it be a court baron, why should it be void? Since a court baron contains in it two courts, one for the freeholders, the other for the copyholders, and since that for the copyholders, as to granting copies, &c. may be held off the manor, there is no reason, that because the court baron is void, that therefore the admittance should, for they are as two distinct courts, and the admittance had been good, had the court been only the copyholder's court; and if we look back to the reason of the thing, if an admittance may be made at a place off the manor, why not at a court held off the manor, for it is no judicial act; if it were, surely it must of necessity be done in court, and therefore it was held per tot. Cur. that a court to do these things might be held off the manor; it is not distinguished in this case between the grant of the lord or steward, but Coke is express, that grants by stewards at courts held off the manor are void. Ideo quære de hoc, Gilb. Treat. of Ten. 302, 303.

13. A lord may make a grant or admittance of a copyhold out of the manor at what place he pleases, but the steward cannot, at a court held of the manor, make any grants or admittances; and in Coke's 1st Inst. 58. a. he says, that a court-baron cannot be held off the manor, unless the lord hath 2 or 3 manors, and hath usually kept court at one for all; which plainly shews, that a lord cannot make admittances or grants at a court held off the manor, no more than the steward; for Coke says, that if the court-baron be held off the manor, it is void; and he there speaks of a court-baron as including the copyholder's court, where the steward is judge; but, as hath been said before, a lord may make admittances or grants out of the manor at what place he pleases which are Coke's words, and must be understood not at court but at some other time or else he contradicts himself. Gilb. Treat. of Ten. 235.

14. If the *under-steward* make *admittances* it is good, but if it be *out of court* it ought to be by a special custom. Arg. 4. Le. 244. pl. 397. Paſch. 8 Jac. C. B. in *Cafe of E. Rutland v. Spencer*.

[96] 15. The *Honor of Hampton* had many manors within it, as O. P. Q. &c. J. S. was a copyholder in the manor of P. and surrendered into the hands of two tenants of the manor of P. according to the custom of that manor, to the use of W. S. his son, and died. The surrender was presented at the next court, and the stile of the court, and recital of this surrender in the copy made out was thus: *At the court baron of the Honor of Hampton J. D. and J. N. tenants of the Honor of Hampton, do present that J. S. did surrender into the hands of the two tenants of the Honor &c.* per 3 Justices against Jones. this is good enough; for P. being in the margin it shall be said a distinct court of itself; for an honor consists of many manors, yet all the courts for the manors are *distinct*, and have several copyholders, and although there is for all the manors but one court, they are quasi several and distinct courts. And it was usual, in time of the abbeyes, to keep but one court for many manors. Cro. C. 366. pl. 4. Trin. 10 Car. B. R. Seagood v. Hone.

16. J. S. was seized of the manors of A. and B. and about 20 years since sold A. to W. R. and now W. R. brought a bill against a copyhold tenant of A. for a rent of 8s. payable out of a copyhold held of the manor of B. and though it appeared from the manor-rolls of B. from H. 8. to Car. 1. that the copyhold was held of the manor of B. and though it was admitted by the plaintiff that the copyhold was held of the manor of B. and not of the manor of A. and plaintiff had no other evidence of title to the rent but that it had been paid near 20 years, yet the Court decreed him the arrears, and growing rent, and denied the defendant a trial at law; and per Wright K. after so long payment of 20 years a grant of the freehold of the copyhold from the lord of the manor of B. shall be presumed. 2 Vern. R. 516, 517. pl. 465. Mich. 1705. Steward v. Bridger.

(O. b) Admittance. Good. In respect of the Estate granted.

4 Rep. 29.
S. C. but
not S. P.

1. **COPYHOLDER** bargained and sold his copyhold, but shewed not what estate, and surrendered it to the use of the bargainee, and the lord granted it to the bargainee in fee; it was good, and the bargainee shall retain it in fee; said it had been so adjudged in *Lippingwell v. Bunting*, and of that opinion was the whole Court in this case, that a custom was good and allowable (being used) that when the tenant doth not appoint the estate of cesty que use that the lord may; the interest of the land being between the lord and the copyholder

holder it is not unreasonable that upon such *uncertainty* it may be *ascertained by the lord*. Cro. E. 392. pl. 15. Paſch. 37 Eliz. C. B. Brown v. Forſter.

[P. b] In what Caſes the *Admittance of one ſhall be of the other*. This in Roll is letter (Y) in fol. 505.

[1.] IF a copyholder *surrenders to the uſe of one for life*, the remainder to another, the *admittance of the tenant for life is an admittance for him in remainder alſo*, becauſe they are but one eſtate, and but one fine is due for both, and if there ought to be an admittance of him in remainder alſo, this would be void, becauſe nothing paſſed before admittance, and ſo the particular eſtate would be determined before the remainder could commence. § Co. 4. 22. & 23. * *Fitch's Caſe* adjudged. Mich. 38 & 39 Eliz. B. R. between † *Keping and Bunning*, dubitatur.] * 4 Rep. 23. a. pl. 6. Fitch v. Huokley. S. P. but it is not the admittance of him in remainder [97] ſo as to prejudice the lord of his fine which

was due by the cuſtom of the manor according to the opinion in *Brown's Caſe*. [4 Rep. 22. b.] —Cro. E. 441. pl. 4. S. C. but S. does not appear. † See (E. b) pl. 1. and the notes there.

2. A. *surrendered to his wife during the nonage of his ſon*, and then to his ſon in tail &c. and died; the wife is admitted accordingly, marries, and dies. The heir at her admittance was but five years old. The ſecond huſband ſhall have the land during the nonage of the infant, for the wife had her ſaid eſtate to her own uſe, and then her huſband ſurviving her ſhall take, and that without any admittance, for that he is not in any of new eſtate but in the eſtate of his wife as aſſignee, but if ſhe had been only guardian or prochein amy it had been otherwiſe. 3 Le. 9. pl. 22. 7 Eliz. C. B. *Dedicot's Caſe*. D. 251. a. pl. 90. Hill. 8 Eliz. S. P. and ſeems to be S. C. —S. C. cited by Vaughan Ch. J. Vaugh. 185. according-ly.—Gilb. Treat. of Ten. 278. cites S. C.

held accordingly by 2 juſtices. —Ibid. 316. cites S. C.

3. Admittance of *tenant for life* is admittance of him in remainder, becauſe the fine is intire, and no new fine due for remainder-man; but otherwiſe it is of him in reversion. Mo. 358. pl. 488. Trin. 36 Eliz. Dell v. Higden. 4 Rep. 23. a. pl. 3. Deal v. Rigden S.C. but S. P. does not

appear. —Cro. E. 372. pl. 17. S. C. but S. P. does not appear. —Supplement to Co. Comp. Cop. 72. f. 7. cites S. C. and S. P. —S. C. cited 3 Lev. 308, 309. —4 Rep. 22. b. in *Brown's Caſe* S. P. reſolved. —Ibid. 23. a. pl. S. P. in caſe of *Fitch v. Huckley*. —a Brownl. 301. Paſch. 7 Jac. C. B. *Warren v. Packman* S. P. reſolved. —S. P. adjudged; for where the lord is to have a fine there muſt be a new admittance. Mo. 465. pl. 658. Paſch. 39 Eliz. B. R. *Tipping v. Bunning*. —Cro. E. 504. pl. 29. *Gypyn v. Bunney*, S. C. and by Popham the tenant for life, and he in remainder have but one eſtate in law, and therefore the admittance of the one ſhall ſerve for the other. —Goldfb. 95. pl. 9. S. C. and S. P. Arg. —Supplement to Co. Comp. Cop. 72. f. 7. cites S. C. and S. P. as held accordingly. —The caſe of Dell v. Higden, as it is reported by Moor, is alſo contrary to the caſes before; for there it is ſaid but one fine is due, but otherwiſe it is of a reversion, which diſtinction is laid quite croſs to what it is in the caſes before, and ſeems to have been a miſtake in the reporter; for as it is againſt the caſes before, ſo it is againſt reaſon. The ſame caſe is reported by Lord Coke, and no ſuch reſolution is mentioned in his report of it, and it is obſervable, that nothing in that caſe as reported by Moor, ſeems to have been either upon reaſon or authority, but one point, which is the ſingle reſolution, as the caſe is reported by Lord Coke. Gilb. Treat. of Ten. 182.

Supplement
to Co.

Comp. Cop.

72. f. 7.

cites S. C.

4 Rep. —

22. b. Mich.

23 & 24.

Eliz. C. B.

the S. P.

but that it

shall not bar

the lord of

his office

which he ought to have by the custom. — S. P. resolved, 4 Rep. 23. a. pl. 6. Pasch. 36 Eliz. B. R. Fitz v. Huckley, but not to prejudice the lord of his fine due by the custom according to the opinion in Brown's Case. — Supplement to Co. Comp. Cop. 72. f. 7. cites S. C.

4. Copyholder of inheritance *surrendered to the use of M. his wife for life*, remainder to C. his youngest son in fee. The wife was admitted, but the son refused during his mother's life, and afterwards, without being admitted, he surrendered to the use of the plaintiff, in the life-time of the mother. Adjudged, that the admittance of the wife was the admittance of the son in remainder, for she being admitted to the particular estate, the remainder depends on that, and vests without other admittance; for both make but one estate. Cro. J. 31. pl. 1. Trin. 2 Jac. B. R. Auncelme v. Auncelme.

5. If he in remainder makes a lease for years before his admittance, the admittance of the termor shall be good to this purpose for him in remainder; per Yelverton J. to which Fenner J. agreed. Bull. 42. Mich. 8 Jac. in Case of Eylliff v. Chopley.

[98]

2 Lev. 107.

S. C. and

S. P. ad-

judged ac-

cordingly.

— Mod.

120. pl. 22.

S. C. and

judgment

according-

ly. — Vent.

260. Batmor.

v. Graves S.

C. resolved.

6. A copyholder *surrenders to the use of several persons for years successive, the remainder in fee to J. S.* Wyld held, that an admittance of a particular tenant is an admittance of all the remainders to all purposes, but only the lord's fine; and if the custom be, that the fine paid by the first tenant shall go to all the remainders, then the admittance of the first man is to all intents and purposes an admittance of all that come after. In this case the possession of the lessee is the possession of the remainder-man. Mod. 102. pl. 8. Mich. 25 Car. 2. B. R. Blackburn v. Graves.

7. Surrender to J. S. and his heirs, if J. S. dies his heir is in without admittance, per Hale Ch. J. who said there had been diversity of opinions, but the better opinion had been according to the Lord Coke's opinion. Mod. 120. pl. 22. Pasch. 26 Car. B. R. in Case of Blackburn v. Graves.

8. Surrender to A. for life, then to his wife for life, and the survivor of them, and after their death, then to the use of his last will, and for want of such will, then to his own right heirs. A. was admitted &c. and made his will, and devised all his estate real and personal to his wife, and after his death, and devised the remainder to be divided by G. and H. (whom he made executors) between his relations, according to their discretion. In ejectment it was found that G. and H. entered with intent to divide the estate according to the will, but were not admitted. The question was, what vested in them before admittance, and what passed by the will. Held, that admittance of tenant for life upon a surrender is an admittance of those in remainder. 5 Mod. 306. Mich. 8 W. 3. Warlop v. Abell.

Co. Comp.

Cop. 50. f.

26. S. P.

9. If a copyholder *surrenders to the use of his last will*, and by that *devises it to 2*, and the lord admits one, this shall enure to both, for when he is admitted, he is in by the surrender, which

which he cannot be unless he be a joint-tenant; for that is his title by the surrender. Gilb. Treat. of Ten. 312, 313.

(Q. b) Admittance of whom it may be in Case of Death of Surrenderee before Admittance.

1. **A** Surrenderee to him and his heirs dies before admittance, *his heir may be admitted.* 4 Rep. 25. a. pl. 11. Pasch. 31 Eliz. B. R. Kite v. Quinton. S. C. cited 4 Rep. 29. b.—S. P. Brampton Ch. J. Mar.

139. at the bottom. Mich. 17. Car.—S. P. agreed for law, it seems that he is in by descent, [when he is admitted] or at least by force of the first surrender, and so in nature of a descent. 2 Sid. 61. cited by Glyn Ch. J. Hill. 1657. B. R. in case of Blunt v. Clark.—Gilb. Treat. of Ten. 207. cites S. C. & S. P. for upon admittance the estate is in cesty que use from the surrender by relation.

2. If a copyholder according to the custom doth surrender into the hands of 2 tenants to the use of J. S. and his heirs, and afterwards the copyholder dieth before the presentment be made of the surrender by the tenants, and the lord before the presentment accepts of the rent of J. S. generally, but not as a copyholder, the heir of the surrenderee may enter into and upon the lands, and receive the profits thereof to his own use, for that nothing vesteth in the surrenderee before admittance, and the inheritance of the copyhold is in the heir quasi by descent. Supplement to Co. Comp. Cop. 79. f. 13. [99]

3. Custom was for a copyhold to descend to the youngest son, and not to the eldest brother; a copyholder surrendered the land to another and his heirs but before admittance, surrenderee dies, leaving two sons, and the question was between the two sons, and adjudged that the eldest son should be admitted, because the custom was, that the estate should descend to the youngest brother, and there was no estate in the ancestor to descend; and therefore the eldest son must have taken as purchaser; but according to the report I have of the case, the Court said, that if the custom had been laid to have been Borough English, the eldest had been excluded, for the law takes notice of Borough English and Gavelkind custom. 6 Mod. 121. cited by Holt Ch. J. as Hill. 1659. Fane v. Barr.

(R. b) Admittance. Where the Custom is to descend to the youngest Son, or is Gavelkind &c.

1. **A** Surrender was to the use of J. S. and his heirs of copyhold land, descendible according to the nature of Borough English. J. S. died before admittance; the Court held, that the right would descend to the youngest according to the custom. Mod. 102. pl. 8. cites it as the Case of Baker v. Dereham. Sty. 148. Mich. 24 Car. B. R. Barker v. Denham, S. C. but S. P. does not appear. —Sup.

Supplement to Co. Comp. Cop. 70. f. 4. cites S. C. but S. P. does not appear. S. P. by Glyn Ch. J. that the youngest son shall have the land, because he is in by descent, or at least by force of the first surrender, and so in nature of a descent. a Sid. 61. Hill. 1657. Blunt v. Clerk. Vent. 261. S. P. by Wilde.

Wms's Rep. 66. S. C. cited per Holt Ch. J. as adjudged in C. B. in Ld. Bridgman's time, between Hale and and adds, that the law taking notice of Borough English is the reason why in pleading that the lands are Borough English, you need not set forth the nature of the custom specially. Wms's Rep. 66. Marg. says it seems to be S. C. as is cited 2 Keb. 158, 159. by the name of Pain v. Herbert. Vent. 261. in case of Batmore, alias Blackmore, v. Graves, per Wild J. said it was so held.

2. Custom was for a copyhold [*of every tenant dying seised,* Wms's Rep. 66.] to descend to the youngest son, and not to the eldest brother. A copyholder surrendered to B. and his heirs, but before admittance B. dies, leaving two sons. Adjudged that the eldest son should be admitted, because the custom was, that the estate should descend to the youngest, and there was no estate in the ancestor to descend; cited per Holt Ch. J. as the case of FANE v. BARR 1659. But he said, that according to the report he had of the Case, the Court said, that *if the custom had been laid to be Borough English* the eldest son had been excluded, and the youngest must have been admitted; for the law takes notice of Borough English and Gavelkind customs. 6 Mod. 121. Hill. 2 Ann. B. R. in Case of Clement v. Scudamore.

Holt's Rep. 265. S. C. 3. If the eldest son, where there is Borough English, be admitted, he is a copyholder *de facto*, and he has a good title against all mankind but the youngest son, and by virtue of it may maintain an ejectment. Trin. 5 Ann. Brown and Dyer.

[100] (S. b) How far the Lord is bound by Admittance.

1. SURRENDER to the use of A. upon trust till money paid, and that after A. shall surrender to B. A. having received the money refuses to surrender to B. The lord decrees a surrender by A. to B. B. refuses. The lord may seize and admit B. for in such case *he is chancellor* in his own court; per tot. Cur. Le. 2. pl. 2. Hill. 25 El. B. R. Anon.

2. Baron and feme copyholders for life, the baron surrendered to the lord who granted the land over by copy to a stranger; the baron died; the feme recovered and entered, and surrendered to the lord; the stranger shall have the land, and not the lord himself against his own grant. 4 Le. 88. pl. 186. Pasch. 26 Eliz. B. R. Anon.

3. A copyhold custom is, that a woman shall have her *free bench, quamdiu se bene gesserit, and live chaste*, and she is incontinent, of which the lord hath not notice, and the lord admits her tenant, it was held that it should bind the lord, though he had not notice of the incontinency. 4 Le. 240. pl. 390. Mich. 3 Jac. C. B. Wheeler's Case.

4. It

4. It seems, that when a *tenant for life makes a surrender in fee*, though nothing can pass by the surrender but what he hath, yet it seems, that *when the lord admits the surrenderee according to this surrender, then he has a fee*; for the lord has an estate to pass a fee-simple. Gilb. Treat. of Ten. 178.

(T. b) To what Time the Admittance shall have Relation.

1. **A.** Seised of *freehold and copyhold makes a lease of both* for years, rendering rent, and after he grants the reversion of the freehold, and makes a surrender of the copyhold to the use of the same person, and an attornment is had of the freehold, and the presentment of the surrender for the copyhold is not made until a year after, yet he in reversion shall have an action of *debt of all the rent*, for the presentment of the surrender is but a perfection of the surrender before made. Lane. 33. cites it adjudged 41 Eliz. B. R. the Case of Collins v. Harding. Cro. E. 606. pl. 6. S. C. — Mo. 544. pl. 723. S. C. — 13 Rep. 57. 58. pl. 24. S. C. — Godb. 139. pl. 169. Harding's Case, S. C. but the point of relation does not clearly appear in any of the said reports. — The admittance relates to the surrender, and surrenderee's title begins from thence. 1 Salk. 185. Benson v. Scot. — 3 Lev. 385. S. C. — 4 Mod. 251. S. C.

2. The wife of a copyholder dying seised is to have his estate for life; he becomes a bankrupt, and the commissioners bargain and sell this land by deed inrolled. The baron dies. The feme is admitted, and afterwards the bargainee is admitted; and it was held, that the copyholder was no tenant after the deed inrolled, for the bargain &c. binds and bars his estate, and the bargainee is barred only to take the profits until the admittance, which is for the lord's benefit in respect of the fine, and not for the copyholders, and though between the bargain and sale, and the inrollment, the tenant dies, and his wife is admitted, yet when the bargainee is admitted by the lord the estate shall vest in the bargainee, and shall have relation to the bargain and sale, and shall devert the estate which the feme claimed by the custom. Cro. C. 568. 569. pl. 6. Hill. 15 Car. B. R. & cites 7 E. 6. Br. Title Inrolments. Parker v. Bleeke. Jo. 451. pl. 4. S. C. and that the bankrupt shall not be said to have died seised of it, notwithstanding the vendees were not admitted in the life of the copyholder. [101]

2. Admittance of surrenderee shall have relation to the surrender. 4 Mod. 251. 254. Hill. 5. W. & M. in R. Benson v Scott. 1 Salk. 185. pl. 3. S. C.

(U. b.) Pleading of Admittances.

1. **W**HERE some have imagined that nothing should be invested in the heir before admittance, because every admittance of an heir upon a descent amounts to a grant, and so may be pleaded, they are in an error; for though it be
I a true

true that *after admittance the heir may in pleading allege this as a grant*, and that has been allowed to avoid the inconveniences that otherwise should ensue, for if the copyholder should be driven in pleading to shew the first grant, either that was made before the memory of man, and so is not pleadable, or since the memory of man, and then custom fails; for this reason the law has allowed a copyholder in pleading to *allege any admittance, as well upon a descent upon a surrender, as a grant, and shew the descent to him, and that he entered and well, without any admittance*. Co. Comp. Cop. 53. f. 41. cites 4 Rep. 22. b. [Mich. 23 & 24 Eliz. C. B.] Brown's Case.

For he is tenant at will of the lord according to the custom of the manor. 4 Rep. 22. b. resolved in Brown's Case.

2. But the heir cannot plead that his ancestor was seised in fee at the will of the lord, by copy of court roll of such a manor, according to the custom of the manor, and that he died seised, and that the copyhold descended upon him, because in truth such an interest is but a particular interest at will, in judgment of law, although it be descendible by custom. Co. Comp. Cop. 53, 54. f. 41.

3. In pleading admittance by a steward he must shew the steward's name. Cro. E. 392. pl. 15. Pasch. 37 Eliz. C. B. Brown v. Foster.

4 Rep. 27. a. b. pl. 15. Trin. 26 Eliz. B. R. Taverner v. Cromwell, S. C. & S. P. resolved accordingly.

4. When a copyholder surrenders to the use of another, and the lord admits him, now he who is so admitted is in by him that made the surrender, and in a *plaint in the nature of a writ of entry in the per, shall be supposed to be en le per by him who made the surrender*, for the lord is but an instrument to make admittance, and he who is admitted shall not be subject to the charges and incumbrances of the lord, for the lord hath but a customary power to make the admittance *secundum effectum sursum-redditionis*. Supplement to Co. Comp. Cop. 72. f. 6. cites Co. Taverner's Case.

5. In admittances made by under-stewards, as well as in admittances made by the stewards themselves, it is good order to express in the copy, and in the court-roll, the name of the under-steward, or the steward, because in *pleading any admittance a man must say, that he was admitted by such a one, under-steward or steward, naming his name*. Co. Comp. Cop. 57. f. 46.

[102] [W. b]. What Persons shall pay *Fines*, and to whom.

This in Roll is letter (Z) in fol. 305.

By such surrender there passes no more than what makes the

[1. A Copyholder in fee surrenders to the use of another for life, when the lessee dies, he shall not pay a fine for a re-admittance to the reversion, for it continued always in him. Co. 9. Marg. Podger 107.]

estate, and the rest remains in the surrenderor. Browal. 181. Bicknal v. Tucker, S. C.

2. Though

2. Though an *heir of a copyholder may surrender to another before admittance*, yet he shall not prejudice the lord of his fine due to him upon the descent, and he is a tenant by copy, for the copy made to his ancestor belongeth to him. 4 Rep. 22. b. pl. 1. Mich. 23 & 24 Eliz. C. B. the 3d Resolution in *Brown's Case*.

Gilb. Treat. of Ten. 151^a cites S. C. and says, quære, whether the lord in such case must admit

before the heir as paid his fine; and if he does, what remedy there is for the fine?

3. Admittance of tenant for life is admittance of him in remainder, but it shall not prejudice the lord as to the fine from him in remainder due to the lord *by the custom*. 4 Rep. 23. a. pl. 6. Pasch. 36 Eliz. B. R. Fitch v. Huckley.

4. Tenure *by tenant right*, as it is usual towards the borders of Scotland, shall not pay any uncertain fine or income *at the charge of the lord by alienation*, but by death, which is the act of God, for otherwise the lord might weary the tenant by frequent alienations, but it may be fine uncertain upon the alienation of the tenant, as well upon death as descent, for that it is the act of the tenant, and in his power. Mich. 1599. The Case of the Manor de Thwaites; & les Justices accord the same holds in Copyholders, for the Custom must be reasonable. Cary's Rep. 9. Egerton (Sir Thomas's) Case.

5. Of fines due to the lord some are by change or alteration of the lord, and some by the change or alteration of the tenant; the change of the lord ought to grow by the act of God, otherwise no fine can be due, but when the *change grows by the act of God*, there the custom is good, as by the *death of the lord*, and this upon a Case in Chancery referred to Popham Ch. J. and upon conference with Anderson &c. and all the Judges of Serjeant's Inn in Fleet-street, was resolved, and so certified into the Chancery, but upon the change or alteration of the tenant a fine is due to the lord. Co. Lit. 59. b.

Supplement to Co. Comp. Cop. 84. f. 19. S. P.—Gilb. Treat. of Ten. 275—cites S. C. but says quære, whether a fine be due of common right upon the alteration of the

lord by death; it seems it is not, but only where there is a particular custom for it; though *Ld. Coke's* words are general, and may be interpreted either way.

6. If a copyhold be granted *durante vita*, and the grantee dies, *living cestuy que vie*, and a stranger enters as a general occupant, he shall be admitted and pay a fine. Co. Comp. Cop. 62. f. 56.

7. Where by the custom of the manor, the *bailiff of the manor is to have the wardship of the copyhold-heir being under the age of 14*, such a guardian shall neither be admitted, nor pay a fine, because he is but a pernor of the profits, and that not in his own right, but in the right of him to whom he is guardian. Co. Comp. Cop. 62. f. 56.

8. By special custom copyholders are to pay fines upon [103] licences granted unto them *to demise* by indenture, but by general custom they are to pay fines only upon admittances. Co. Comp. Cop. 62. f. 56.

A fine is due upon admittance upon a voluntary grant. Gilb. Treat. of Ten. 315. cites Co. Comp. Cop.

9. If the lord having a copyhold by *escheat, forfeiture, or other means, makes a voluntary admittance*, a fine is due unto the lord. Co. Comp. Cop. 62. f. 56.

10. If a copyholder *surrenders to the use of a stranger*, and the lord admits, a fine is due to the lord. Co. Comp. Cop. 62. f. 56.

11. If a copyhold be *granted to one and his heirs durante vita*, and the *grantee dies*, and his *heir enters as a special occupant*, where by the custom of the manor a copyhold may be extended, upon the extent the party shall be admitted, and shall pay a fine. Co. Comp. Cop. 62. f. 56.

12. If the copyhold lands of a *bankrupt* be sold according to the statute of the 13 Eliz. cap. 7. the *vendee* shall be admitted and pay a fine. Co. Comp. Cop. 62. f. 56.

13. If a copyhold be *granted upon condition*, and the condition be broken, and the *grantee enters*, he shall not be admitted, neither pay a fine, because upon the breach of the condition and the entry, he is to all intents in statu quo prius, as if no grant at all had been made. Co. Comp. Cop. 63. f. 56.

14. If a *copyholder in fee surrenders for life, reserving the reversion*, and the *lessee for life dies*, the copyholder shall not be admitted to his reversion, neither shall he pay a fine, because the reversion was never out of him. Co. Comp. Cop. 63. f. 56.

15. If a *copyholder be disseised*, and then *enters upon the disseisor, or recovers by plaint in the nature of an assise*, he shall not be admitted, neither shall he pay a fine, for he continues still tenant by copy, notwithstanding the disseisin; *but where by a plaint a copyhold is recovered upon the accruer of a new title, where be that recovers was never admitted, nor paid fine*, there upon his recovery an admittance is requisite, and a fine is due; *as if a copyholder died seised, a stranger abates, and the heir recovers by plaint in the nature of an assise of mortdancestor*, upon this recovery he shall be admitted, and pay a fine. Co. Comp. Cop. 63. f. 56.

16. If I *take a wife with a copyhold in fee*, though by this intermarriage there accrues a present interest to me, yet because I am seised not jure proprio, but jure alieno, therefore I shall not be admitted, neither shall I pay a fine. Co. Comp. Cop. 63. f. 56.

17. The *same law is if she be a termor of a copyhold*, for though the term by the intermarriage be so vested in me that I may dispose of it without controul, yet because before disposal, I am possessed of it but in the right of my wife, therefore I shall neither be admitted, nor pay a fine. Co. Comp. Cop. 63. f. 56. cites Pl. C. 418. b.

18. If a copyhold be *surrendered for life*, the *remainder to a stranger*, though the admittance of tenant for life be sufficient to

to invest the estate in him in the remainder, yet upon the death of a tenant for life, he in the remainder shall be admitted and pay a fine. Co. Comp. Cop. 63. f. 56.

19. So if a copyhold be granted to 3 *habend. successive*, where by custom succession is in force, if any one dies, he that next succeeds shall be admitted, and pay a fine. Co. Comp. Cop. 63. f. 56.

20. If 2 *copartners, or tenants in common* of a copyhold be, and the *one dies, and the other has all by descent*, he shall be admitted, and shall pay a fine; but if 2 *jointenants* be of a copyhold, and *one dies*, the other shall have all by the survivorship without admittance, or paying a fine, because jointenants to all intents and purposes are seized per my & per tout. Co. Comp. Cop. 63. f. 56. [104]

21. Upon admittance of a feme to her *widow's estate by the custom* no fine is due to the lord. Noy. 29. Hill 15 Jac. C. B. in Case of Rennington v. Cole, Gilb. Treat. of Ten. 209, 210. makes a quare of this, for

though the estate be adjudged in the woman, yet that is no argument that she shall pay no fine, for the estate is in the heir by descent, and yet he shall pay a fine, and both are compellible to be admitted, and then why should they not pay a fine? So of dower and curtesy. Ibid. 210.—— If a copyhold descends, and the lord admits the heir, where by the custom of the manor the wife is to have dower, and the husband is to be tenant by the curtesy of the copyhold, either of them shall be admitted, and shall pay a fine to the lord. Co. Comp. Cop. 62. pl. f. 56.

22. Surrender to *A. for years, remainder to B.* The lord may assent one fine for the particular estate, and another for the remainder; but per Wylde J. he need not till his estate comes into possession. Vent. 260. Trin. 26 Car. 2. B. R. Batmore, (alias, Blackburn) v. Graves, But if a fine is assented for the whole estate, there is an end of the business; though if it

be assented only for a particular estate the lord ought to have another; per Hale Ch. J. Mod. 102, pl. 22. Pasch. 26 Car. 2. B. R. in case of Blackburn v. Graves.——Mod. 102, pl. 8. S. C.——Gilb. Treat. of Ten. 151. cites S. C.

23. The Court doubted whether the custom was good as to the claiming an alienation fine *upon an alienation for life*, because by that the tenure of the lands aliened is not altered; for the reversion is still held as before by the same tenant. 2 Vent. 135. Hill. 1 and 2 W. and M. in C. B. in Case of Holland v. Lancaster.

24. In a special verdict in ejectment the case was, the father being seized of a copyhold in fee, surrendered it to the use of himself and his wife for life, remainder to the son (the now defendant) in tail; the father and mother were admitted, and paid a fine, and being both dead, the defendant prayed to be admitted to the remainder, which was done, and a fine of 581. set upon him, which was demanded, and a day and place appointed for the payment of it, which he did not pay, and said that he thought that none was due, he being admitted by the admittance of his father and mother, tenant for life, and therefore refused to pay it; adjudged, that no fine is due, unless there is a special custom for it, and what Lord Coke says, 4 Rep. 22, 23. b. that such admittance shall not prejudice the lord in respect

of his fine, is to be intended where such fine is due by custom for the admittance to the remainder, but *without special custom none is due.* 3 Lev. 308, 309. Trin. 3 W. & M. in C. B. Barnes v. Corke.

25. *The admittance of tenant for life is an admittance of him in remainder as to vest the estate, but not to prejudice the lord of his fine,* saith Lord Coke; therefore upon the death of tenant for life, he shall be admitted, and pay a fine; for though his estate of tenant for life vests, yet he was never tenant to the lord for the admittance to which he pays his fine; *but if a copyholder in fee surrenders to the use of one for life, and the tenant for life dies,* he may enter without any new admittance, or paying any fine, for he had his old estate in him, and he was admitted tenant before; yet it was said by Popham, in CUPPIN AND BUNNEY'S CASE, that one fine is due in such case, but it is but of little authority, for the point of the case was, whether the admittance of tenant for life was the admittance of him in remainder, and because it was made an objection, that if it were, the lord would lose his fine, which Popham answers by saying, there is none due in such case, which objection Lord Coke answers by saying, that though the estate be vested in the remainder-man, yet a fine is due. Gilb. Treat. of Ten. 181, 182.

[105] 26. Where the custom is for a copyholder's lands to be extended, the *extendor* shall be admitted and pay a fine. Gilb. Treat. of Ten. 315.

[X. b] Fines. How much shall be paid. And where one or several.

This in Roll is letter (Z) pl. 2. in fol. 505. Cro. E. 504. pl. 29. Gyppin v. Bunney seems to be S. C. and Popham

and Fenner thought that only one fine was due; but because the other judges were absent adjournatur. — Mo. 465. pl. 658. Tipping v. Bunning S. C. and S. P. and therefore there needs no new admittance; but when the lord is to have a fine [by the custom suppose] there a new admittance is necessary. — Gouldsb. 95. pl. 9. Kipping's Case S. C. argued but S. P. does not appear. — The fine paid by tenant for life is intire and no new fine is due for him in remainder but otherwise it is of him in reversion. Mo. 358. pl. 488. Trin. 36 Eliz. Dell v. Higden.

[1.] IF a copyholder in fee surrenders to the use of one for life, the remainder to another for life, the remainder to another in fee, by this but one fine is due; for the particular estates, and the remainders are but one estate. Mich. 38 & 39. B. R. by Popham.]

2. It is decreed by assent, that the defendant being lord of the manor of Alderwasly, shall have for a fine of a copyholder upon a surrender, one *whole year's value, as the same is reasonably worth*, according to the usual rates of lands in that country. Cary's Rep. 77. cites 18 & 19 Eliz. Blackwell & al. v. Low.

3. If two jointenants, or two tenants in common, or tenant for life, and he in the remainder, join in a grant of a copyhold, one fine only is due, and it shall enure as one grant only; so if a surrender

surrender be made, and after a common recovery is had by plaint in the nature of a writ of entry en le poft, for the better affurance one fine only fhall be paid. Co. Comp. Cop. 63. f. 56. cites 4 Rep. 27. b. Hubbard v. Hammond.

4. If one copyholder has *diverfe feveral lands feverally holden by feveral fervices by copy*, the lord ought to demand feveral fines for every parcel which is fo feverally holden, for the tenant may refufe to pay the fine for one parcel, and pay the fines for the others. 4 Rep. 28. a. Mich. 42 & 43 Eliz. the third Refolution in Cafe of Hubbard v. Hamond.

Cro. E. 779. pl. 13. Dalton v. Hammond, S. C. and S. P. refolved accordingly. — Mo.

622. pl. 851. S. C. refolved accordingly.

5. If two *feveral copyholders join in a grant of their copyholds by one copy*, or if one copyholder, having feveral copyholds, grants them by one copy, yet the grantee fhall pay feveral fines, for they fhall enure as feveral grants. Co. Comp. Cop. 63. f. 56.

6. 5l. 12s. 8d. was held an unreasonable fine for admitting a furrenderee to a cottage, and an acre of paffure, being copyhold of inheritance; for this is not like to a voluntary grant, as when the copyholder hath but an eftate for life, and dieth, or if he hath an eftate in fee-fimple, and committeth felony, there *arbitrio domini res æftimari debet*; but when the lord is compellable to admit him to whose ufe the furrender is, and when *ceftui que ufe* is admitted, he fhall be in by him who made the furrender, and the lord is but an instrument to preſent the fame; and therefore in ſuch caſe, the value of two years for ſuch an admittance is unreasonable, eſpecially when the value of the cottage and one acre of paffure is a rack at fifty-three ſhillings by the year. 13 Rep. 3. Mich. 6 Jac. in Willowe's Cafe.

Supplement to Co. Comp. Cop. 75. f. 10. cites S. C. — Gilb. Treat. of Ten. 224. 225. cites S. C.

7. If a copyhold *efcheats*, the lord ought to increaſe and improve his fine before he regrants it, or he has no remedy afterwards, for he is not compelled to grant it again, and ſo may have *what fine he will*. Arg. Het. 6. Paſch. 3 Car. C. B. in Cafe of Paſton v. Manne.

8. A moderate year's value is a *reaſonable* fine in caſe of a *tenantright* upon every alienation or death of the tenant, or death of the lord, and the defendants to give notice of every alienation at the lord's court, and the fine now aſſeſſed not to be taken as a fine certain, and a Maſter of this Court to ſet the ſaid fine. Ch. Rep. 33. 5 Car. 1. Middleton v. Jackſon.

Ibid. 96. Popham v. Lancaſter S. P. 12 Car. 1. where the fines had not been certain, the court upon

precedents produced, and eſpecially the principal caſe of Middleton v. Jackſon, decreed, that an improved year's value, in a moderate way, ſhall be given and accepted from the tenant to the lord for a fine.

9. In trefpaſs, the queſtion was, whether the lord might aſſeſs *two year's and an half's value of the land according to the rack-rent for a fine*, and for non-payment enter for a forfeiture? and all the court held he could not, for it is unreaſonable;

It was agreed by all the court, that by the cuſtoms of ſome manors

[106]

a fine of 4 or 5 years value might be reasonably set; as in the manor of H. and C. where the custom is for a stranger to pay a fine upon his admittance to a copyhold; but if once a tenant, he pays a fine no more; and Dolben cited a case of Pincent the prothonotary, who was a rich man, and purchased a house in C. and 5 years value was set for a fine; and the matter was disputed, and came to a trial; and it was held to be a reasonable fine, and that in such a case he might have set 7 years value. But in the principal case, which was in case of an infant, the other 3 judges being of opinion that the infant was not bound by the custom, the Lord Ch. J. consented, that a judgment given in C. B. should be affirmed. Freem. Rep. 496. pl. 670. Mich. 1689. in case of King v. Dillington.

Via. R. 164. 10. Renewing copies after expiration of 99 years absolute without any payment of fines upon death or alteration to the lord, limited at *two year's value*. 2 Chan. Rep. 134. 19 Car. 2. Morgant v. Scudamore.

6. C. but the tenants decreed to renew within one year after the leases expire, or return from beyond sea, or attaining 21.

11. Upon a writ of error the question was, whether a custom for a copyholder upon his admittance to pay *a year's value of the land, as it is at the time of the admittance*, were a good custom and ruled in C. B. that it was a good custom, and the judges in B. R. inclined that it was a good custom. Freem. Rep. 494. pl. 669. Pasch. 1682. Anon.

12. An alienation fine was set forth to be due *upon the alienation of any parcel of lands or tenements* held of the manor of M. to have *a year and half's rent, by which the lands or tenements so aliened were held*; so that if the 20th part of an acre be aliened, a fine is to be paid, and that of the whole rent, for every parcel is held at the time of the alienation by the whole rent, and no apportioning thereof can be but subsequent to the alienation, and this the whole Court held an unreasonable custom; and as it is set forth, it could not be otherwise understood, than that a fine should be due, viz. a year and a half's rent upon the alienation of any part of the lands held by such rent. 2 Vent. 134, 135. Hill. 1 & 2 W. & M. in C. B. Holland v. Lancaster.

[107] 13. *Tenant for life, and he in remainder, join in a grant of their copyhold*; but one fine is due, Gilb. Treat. of Ten. 316.

14. So if a *surrender* be made, and after a recovery is had by plaint, in the nature of a writ of entry in the post, for the better assurance; but one fine is due, Gilb. Treat. of Ten. 316.

(Y. b) Fines. Certain or uncertain.

1. A Fine is *not* to be *decided by witnesses*, but by court rolls, and ordered to go to hearing upon them. 10 Jac. li. B. fo. 176. Toth. 167, Hopton v. Higgins.

2. To *prove a custom of uncertainty of fines*, and not to be certain two year's rent, there ought to be shewn court rolls, and that in cases of descents that upon such admittance they have used to pay above two year's rent; but rolls, to prove uncertainty of fines (though in cases of descents) if the fines are under the value of two years rent, they are no proof at all, for the fines must be above two years rent; for it is a good a custom to pay for fines upon admittances, the value of two years rent or under, and the proofs *must be in cases of descent*; for in *case of a surrender or purchase of a copyhold the lord may take what fine he will*, but such fines are no proof of taking uncertain fines by the custom but it must be in cases of descent. Per tot. Cur. absente Fleming Ch. J. 2 Bulst. 32. Mich. 10 Jac. on a trial at bar. Allen v. Abraham.

3. Held in chancery, that where by *ancient rolls of court* it appeared that the fines of the copyholder had been uncertain from the time of King H. 3. to the 19 H. 6. and from thence to this day had been *certain*, except 20 or 30 that these few ancient rolls did *destroy the custom* for certainty of fine; but if from 19 H. 6. all are certain except a few, and so uncertain rolls before the few shall be intended to have escaped, and should not destroy the custom for certain fines, Godb. 265. pl. 365. Trin. 13 Jac. in Canc. Lord Gerard's Case.

4. There is scarce a copyhold in England but the fine is really uncertain; for if the rolls make it appear that *sometimes a less and sometimes a greater sum has been paid for a fine*, this is a fine uncertain; per Richardson J. to Harvey privately. And he said, that he was of counsel in a case where the jury found that the fine was certain, and afterwards by bill in chancery it was decreed upon search of the rolls to be a fine uncertain, and that this is now the ordinary course by decree in chancery, Litt. Rep. 252. Pasch. 5 Car. C. B. Anon.

5. Whether fines be certain or not to regulate the same, the most number of court rolls are to determine, and the time. 14 Car. and Mich. 15 Car. Toth. 167. Burrafton v. Walfh.

6. A former decree was confirmed, and an award by which the *commons and inclosures* between the lord and his tenants, and land in the bill mentioned were *bounded and ascertained*, and the *arbitrary fines reduced to a certainty*, and enjoyed and paid accordingly till defendant, who had now purchased the manor, refused to be bound by it. Fin. R. 154. Mich. 26 Car. 2. Meadows v. Patherick.

7. In

Ibid. 250, 251. S. C. error was brought of this judgment in B. R. and the justices seemed to agree to the reasons offered by Levinz, but for the manner of laying this custom curia advisare vult.—3 Mod. 138.

b. C. in B. R. and the court affirmed the first judgment and all held the custom good.

7. In Replevin, the defendant avowed for damage feasant; the plaintiff in bar of avowry pleads that it is a copyhold &c. and that there is a custom &c. quod quælibet persona &c. quæ admissa * fuit &c. to a copyholder, solveret & usi & consueverunt solvere to the lord for fine *tantam denariorum summan quantam terra valebant per annum tempore admissionis prædictæ*. & fur ceo demurrer. Levinz J. said, that this question had been inclusively resolved 40 times, viz. in all cases where 2 year's value had been adjudged reasonable, and said, that he did not see any difficulty in assessing the fine, for the lord might have the value enquired by the homage, and if the true value was not assessed in that case, the party might have taken issue; adjudged for the plain, per tot. Cur. Skin. 247. 250. pl. 2. Hill. 1 & 2 J. 2. C. B. Titus v. Perkins.

(Z. b) Fines. How to be assessed or demanded.

Mo. 628. pl. 851. S. C. & S. P.—4 Rep. 28. pl. 16. Hubbard v. Ham-

mond S. C. and S. P.—And if all such copyholds are surrendered to the use of another and his heirs, tenend. per antiqua servitia inde debita & de jure consueti, there, as was resolved in Tavernor's Case, the tenures are several, and therefore the fines ought to be severally assessed and demanded. 4 Rep. 28. a. pl. 16. Mich. 42 & 43 Eliz. B. R. Hubbard v. Hammond.

Supplement to Co. Comp. Cop. 75. f. 10. cites S. C.

and S. P. that it shall be determined per arbitrium boni viri, and the court and justices of it shall be judges of the reasonableness of the same, if it be pleaded that the fine demanded by the lord or the distress for it be unreasonable and excessive. 13 Rep. 2, 3. Mich. 6 Jac. C. B. in Willowe's Case S. C. resolved, and that always when reasonableness is in question, the same shall be determined in the court where the action is depending.

1. IF *divers copyholds* descend to one, the lord cannot demand *one fine* for them all, but he ought to demand several fines. For perhaps the heir may accept of the one at the fine assessed, and refuse the others on such fines, Cro. E. 779. pl. 13. Mich. 42 & 43 Eliz. B. R. Dalton v. Hammond.

2. The court and the jurors shall be judges of the fine, whether it be reasonable or not, without suit in chancery. Mo. 623. pl. 851. Mich. 42 & 43 Eliz. B. R. Dalton v. Hammond.

3. A custom that a copyholder for life may nominate one or two that shall have the copyhold lands after his death, for a fine to be assessed by the homage if they cannot agree with the lord, is good. Noy. 2. Yelmester Custom's Case.

4. A custom to pay what fine the homage should set was ruled to be good; and so held in a case Hill. 6. Jac. C. B. Rot. 613. Freem. Rep. 494. pl. 669. says it is cited in the Lord Ch. J. Hale's MS. in Lincoln's Inn Library.

5. By the custom of a manor of a fine was due to the lord for a licence to the tenant or alien. It was agreed by all, that the lord may assess a fine out of the manor, and likewise he may make it payable out of the manor and judgment accordingly; but if it had been for a forfeiture, the court said it might have

have been *otherwise*. Lord Raym. Rep. 44. 45. Pasch. 7 W. 3. C. B. Yaxley v. Rainer.

* [A. c] [Fines.]
At what Time due.

This in Roll is letter (A. a)

[1. **A** Fine for an admittance of a copyholder is not due before admittance, but *after admittance*. Trin. 4 Jac. B. R. between *Fish and Rogers*, agreed.

Fol. 506.

Where the fine is certain the heir

ought to tender it on his prayer to be admitted, otherwise the lord is not bound to admit him. Cro. E. 779. pl. 13. Mich. 42 & 43 Eliz. B. R. Dalton v. Hammond. — Mo. 623. pl. 851. S. C. he ought to bring it with him to the court and pay it before admittance, and if he be not ready to pay such fine it is a forfeiture, otherwise if the fine be uncertain, but there he ought to pay it in convenient time after the lord has assented it, and if he does not pay it, it is a forfeiture. — Cro. E. 779. S. P. — Supplement to Co. Comp. Cop. 75. f. 10. cites S. C. and S. P. accordingly. — 4 Rep. 28. a. pl. 16. Hubbard v. Hammond S. C. & S. P. — Gilb. Treat. of Ten. 205. says that as this case is reported by Crooke, it is said, when a fine is certain, the heir ought to tender it upon his prayer to be admitted; as it is reported by Cook, it is said no fine is due till admittance, and that admittance is the cause; and that as Crooke reports it, so as Mo. 623, and if he does not pay it, it is a forfeiture. This seems to contradict what he said before; for if it cannot be a forfeiture till admittance, the demand of the fine must be of the person of the tenant to make a forfeiture; so of rent. — Freem. Rep. 496. Mich. 1689. in case of King v. Dillington, S. P. said to be accordingly. — 4 Rep. 28. a. pl. 16. in case of Hubbard v. Hammond Popham Ch. J. says it was adjudged in one Sand's Case, that no fine is due to the lord, either upon surrender or descent till admittance, for the admittance is the cause of the fine, and if after the tenant denies to pay it, is a forfeiture; and that so it was resolved by Wray and Periam justices of assize in Suffolk, between Sir Nich. Bacon and Flatman. — Supplement to Co. Comp. Cop. 74. f. 10. cites S. C.

2. The heir of a copyholder *within age* is not bound to come to any court during his nonage to tender his fine. 4 Le. 20. pl. 84. S. C. in totidem verbis. 3 Le. 221. pl. 294. Pasch. 30 Eliz. B. R. Anderson v. Hayward.

3. Prescription that copyholder shall *pay a fine on change of every lord* was ruled a void custom by all the judges, for lord may change his manor every day, but if it be that *after the death* of the lord a fine be paid, it is a good custom, for it is the act of God. Arg. Litt. R. 233. Mich. 4 Car. C. B. cites Armstrong's Case. Heil. 1274 Arg. cites S. C. accordingly. — The admittance of tenant for life is the admittance

of him in remainder because they make but one estate; but the lord shall have a fine for the remainder-man's interest, but the remainder-man need not pay it till after the death of tenant for life, for then he becomes tenant to the lord. Mich. 8 W. 3. B. R. per Holt cites Mod. 120. Blackburn v. Greaves, and adds, that the admittance of tenant for life is the admittance of him in remainder, so as to vest the estate, but not to prejudice the lord of his fine, for after the death of tenant for life, he in remainder shall be admitted again. Quære. Gilb. Treat. of Ten. 151.

4. There is no fine due to a lord *so long as he has a tenant*. 3 Ch. R. 36. Pasch. 21 Car. 2. in case of the Attorney General v. Sands.

5. The defendant and others were the plaintiff's tenants in the north, and the duke *claimed a general fine upon the death of the late dutchess*; and a great number of tenants denying the duke's right to such a fine, as being only tenant for life by settlement &c. the duke brought his original bill to establish his right. The defendants by answer insisted, the duke was not intitled Fortescue Aland, Rep. 42. Mich. 12 Geo. 1. in B. R. the Duke of Somerset v. France &c

al. S. C. says, it was agreed, that a custom

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that every copyholder shall upon the change

of every

lord pay a

fine is a void

custom; but

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lord is only

tenant for

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is good.

intituled to a general fine *as next admitting lord upon the dutchess's death*, and defendants brought a cross-bill to be relieved against the duke's demand, and to establish their rights.

Upon the hearing this cause 11 June last, Lord Chancellor *directed an issue*, whether the duke was entitled to a general fine upon the death of the dutchess as next admitting lord, or not.

And upon trial at the bar of B. R. the last term it was *found for the duke*, and now upon the equity reserved, *the court declared and established the duke's right to the general fine*, and decreed the tenants to pay the fines assessed, reserving a liberty to such of the tenants as should think fit to try the reasonableness of the fine assessed upon ejectment to be brought by the duke, at the peril of forfeiting their estates. MS. Rep. Mich. Vac. 1735. Somerfet (Duke) v. Freame & al. & e contra.

(B. c) What remedy lies for the Lord for his Fine.

Debt will

lie for a

fine upon

an admit-

tance to a

copyhold;

admitted by

all Carth.

92. Mich.

1 W. & M. in B. R. in a nota, in the case of Shuttleworth v. Garnet. — Gilb. Treat. of Ten.

274. 275. cites S. C. and says it seems it lies in any case; for the verdict finding that copyholders

ought to pay a fine certain, did not any more entitle the lord to his action of debt, than he was

before; and it seems to me, that if upon demand he refuses to pay the fine, it is a forfeiture. It

is made a quære in that case, whether if a copyholder in fee die, and his heir waives the posses-

sion, and refuses to be admitted, whether the lord shall have debt for the fine? and the reporter

thinks he cannot waive the possession, which to me it seems he may do in court of record, or in

that case of copyhold lands in the lord's court; and if he may do it, then no fine is due.

1. **T**HE lord may bring *action of debt* against the copyholder for his fine; per Windham and Twisden justices, and not denied by any, and Twisden said that so it was held by Foster J. 15 Jac. which was not denied, but it was said, that the opinion of Bacon was e contra. Sid. 58. pl. 26. Mich. 13 Car. 2. B. R. in case of Wheeler v. Honour.

Gilb. Treat.

of Ten. 274.

275. cites

S. C. and

says it seems

to him,

that the

heir may

waive the

possession in

court of

record, or

in the case

of copyhold

lands in the lord's court; and if he may do it, then no fine is due.

2. If a copyholder be in fee where the fine is certain, and his *heir waives the possession*, quære if the lord may have action of debt against him for this fine; the reporter says it seems to him that he cannot, inasmuch as he refused to be admitted, and waived the possession. But then he makes a quære as to the waiver of the possession; because some hold, that he cannot waive the possession; for, being an inheritance, interest descends, and therefore præcipe quod reddat lies against the heir at common law before his entry. Sid. 58. pl. 26. Mich. 13 Car. 2. in a nota at the end of the case of Wheeler v. Honour.

3. It is not de communi jure that if the tenant refuses to pay the fine that he *forfeits his estate*, for in some places the lord *shall seise tantum quousque* &c. and therefore here he ought to allege *a custom that he shall forfeit his estate for a refusal*. Arg.

Arg. and seems admitted. Skin. 250. Hill. 1 & 2 Jac. 2. C. B. Titus v. Perkins.

4. If the lord demands more than he ought, he may make his demand *de novo*, for the judge, in case of a *greater demand than his due*, ought not to *adjudge as much as is due* to the lord, and bar him from the residue, *but* ought to *adjudge against him for the whole*, and that his entry was tortious if he had [111] entered, and put him to a new demand; per Herbert Ch. J. Skin. 249. Hill. 1 & 2 Jac. 2. C. B. in case of Titus v. Perkins.

5. 9 Geo. 1. cap. 29. s. 1. Enacts, that *where any persons under the age of 21 years, or femes covert, shall be intituled by descent or surrender to the use of a last will, to be admitted tenants of any copyhold tenements, such infant or feme covert in their proper persons, or such feme covert by her attorney, or such infant by his guardian, then his attorney (for which purpose they are empowered by writing to appoint attornies) shall appear at one of the three next courts which shall be kept for such manor, whereof such tenements shall be parcel, and shall there tender themselves to be admitted tenants, and in default of such appearance, and of acceptance of such admittance, the lord or his steward, after three courts bolden and proclamations made, may nominate at any subsequent court, any fit person to be guardian or attorney for such infant or feme covert for that purpose only, and by such guardian or attorney may admit such infant or feme covert, and impose such fine as might have been imposed, if such infant had been of full age, or such feme covert unmarried.*

6. S. 2. *The fine set thereon may be demanded by the bailiff, by a note signed by the lord or his steward, to be left with such infant or feme covert, or with the guardian of such infant, or husband of such feme covert, or with the tenant of the tenements to which they were admitted; and if the fine be not paid to the lord or his steward, within three months after demand, the lord may enter upon such copyhold estate, and hold the same, and receive the rents, but without liberty to sell any timber till by such rents be be paid the fine with costs, although such infant or feme covert happen to die before such costs and fines be raised; of all which rents received the lord shall yearly on demand render an account, and pay the surplus to such person as shall be intituled.*

7. S. 3. *As soon as such fine and costs shall be satisfied, or if after such seizure and entry the fine and costs shall be tendered, then such infant or feme covert, or other person intituled, may enter and take possession; and if the lord, after the fine and costs satisfied, or tendered, shall refuse to deliver possession, he shall be liable to make satisfaction for all damages and costs.*

8. S. 4. *Where any infant or feme covert shall be admitted to any copyhold tenements, if the guardian of such infant, or husband of such feme covert, shall pay the lord the fine and the costs, then the guardian or the husband, their executors &c. may enter into, and hold the said copyhold tenements, and receive the rents till they*
be

be satisfied all the money they shall disburse on the account aforesaid, notwithstanding the death of such infant or feme covert.

9. S. 9. *If the fine be imposed in any of the cases before mentioned shall not be warranted by the custom of the manor, such infant or feme covert shall be at liberty to controvert the legality of such fine, as they might have done if this act had not been made.*

[112] (C. c) Remedy for Fines after the Lord's Death. For whom it lies.

Carth. 90. S. C. adjudged accordingly, by three justices against Holt Ch. J. — Comb. 151. S. C. adjudged by three justices,

1. **THE** lord assessed a fine upon admittance of a copyholder of inheritance and died. *Executors brought an assumpsit*, and held per 3 Justices, that it lies; but Holt Ch. J. contra, because it is a duty arising out of an inheritance, custom, or tenure; but by the other three in this case the fine is set, and does not depend on the inheritance, but is as fruit fallen. 3 Lev. 161. Trin. 1 W. & M. in C. B. Shuttleworth v. Garnet.

contra Holt, that an indebitatus assumpsit lies for the lord of a copyhold manor for a fine; but this case does not mention that the action was brought by, but against an executor. — 3 Mod. 239. S. C. adjudged by three justices, contra Holt Ch. J. for he held, that if the defendant had died indebted to another by bond, and had not assets besides that would satisfy this fine, if the executor had paid it to the plaintiff, it would have been a devastavit in him.

And if the heir dies before payment of such customary fine, action lies for his administrator. *Ibid.*

2. The heir cannot enter for a fine in his ancestor's time; but per Holt Ch. J. if it were forfeited and demanded he may. Show. 35. Trin. 1 W. & M. in Case of Shuttleworth v. Garret.

(D. c) Forfeiture. In what Cases. And the Effect thereof.

Lord Coke says, that if a copyholder be outlawed or excommunicated, upon presentment the lord shall have the profits of the lands. It is said in Lex. Cust. 210. that if a copyholder be outlawed in a personal action, it is no forfeiture of his copyhold, but the king shall have the profits; quære of this; for then how can the lord have his services paid him? quære, if a copyholder forfeits any thing in outlawry, unless for a capital crime. Gilb. Treat. of Ten. 227.

1. **WHERE** a copyholder is outlawed the king shall have the profits of his copyhold lands, and the lord has not any remedy for his rent. Arg. Le. 99. at the End of pl. 126. Mich. 30 Eliz.

Hell. 127. cites S. C.

2. A copyhold is not determined or forfeited by outlawry. Litt. Rep. 234. Arg. cites it as adjudged 44 Eliz.

3. All forfeitures may be reduced into these heads; either voluntary acts done to the prejudice of the lord, or negligent or wilful refusal to do and pay his duties and services to the lord, which

which by the laws and customs of the manor he ought to do and perform. Supplement to Co. Comp. Cop. 74. f. 9.

4. An entry *before admittance* is no forfeiture, without a special custom pleaded, but the heir may make a forfeiture for non-payment of the rent, as the custom was there pleaded before admittance. Calth. Reading 60. cites 30 H. 8. Dy. 41. 16. there.

5. If the tenants have used to have common of pasture in their lord's woods, for horse-cattle, and they put in their neate-cattle, and destroy the woods, this is an abuser; but it is but *fineable*, [113] and no forfeiture of the common, which they might have rightfully used, no more than if they have common for a certain number of beasts in the lord's soil, and they will exceed the number; this abuse by their surcharging is only fineable, and no forfeiture. Calth. Read. 26.

6. Where the law gives the lord *other recompence* it never will make a forfeiture. Litt. Rep. 267. Pasch. 5 Car. C. B. *Pafton v. Utbert.* Hutt. 106. S. C. and of the same opinion

were all the court.—Hut. 5. *Pafton v. Manne*, S. C. adjournatur.

7. By forfeiture copyhold is *extinguished*, and so determined. Arg. Skin. 8 Mich. 33 Car. 2. B. R.

8. The case of a copyholder was *compared to the case of a tenant at will*, viz. that which would be a determination of the will at common law, is a forfeiture of the copyhold. 11 Mod. 94. pl. 3. Arg. Mich. 5 Ann. B. R. Anon.

9. Sir H. P. *copyholder in fee* of lands held of the manor of Perworth in the county of Suffex, which belonged to the defendants in 1693, *makes a settlement of them on his marriage with Jane Janct, in trust for himself for life, then to Jane for life, then to the first and every other son of that marriage in tail male successively &c.* The premises were afterwards surrendered to the uses of the settlement, which *surrender was accepted by the defendant, lord of the manor, but no admittance upon it, nor any fine that appeared*; Sir Henry had issue the other plaintiff his eldest son, and Jane died. The bill charges, that the defendants pretending that the plaintiffs, by *leasing a meadow, part of the copyhold, without licence* from them, contrary to the custom of the manor, had forfeited the said copyhold meadow to them as lords of the said manor, who insisted upon the said forfeiture, and brought an ejectment against the plaintiff, Sir Henry, to recover the possession; the bill therefore prayed to be relieved against the said forfeiture upon payment of costs, &c.

MS. Rep. Trin. 7 Geo. in Canc. Sir Henry Peachy v. the Duke and Duchess of Somerset.

The defendants by their answer insist, that the custom of the manor was established by decree of this Court 36 Eliz. yet the plaintiff, Sir H. Peachy, 25 January 1714, had made a lease of this copyhold meadow to one Allen for 11 years, 13l. per ann. without licence from the defendants, and they do insist upon this lease as a positive and wilful breach of the custom, and also, that the plaintiff had forfeited several other

copyhold tenements by grubbing up hedges, topping, and lopping timber trees, and digging quarries &c.

The plaintiffs, upon this, bring a supplemental bill, and charge, that the several leases referred to by the answer were made by one Dee, then steward to the defendants &c. and were made without any design to prejudice the defendants, and as to the pretence of waste they charge, that about 25 years ago the defendants did sell several timber trees to several copyholders, and among the rest some to the plaintiff, with liberty to carry them off in 15 years, which was the same timber, and no other; that as to hedges grubbed up, they were such as grew between copyhold lands on both sides, and not between copyhold and freehold.

The answer to this bill admitted Dee to be steward to the defendants, and put the other matters in issue.

Counsel for the plaintiffs cited several cases of relief against forfeitures in this Court, and particularly in the cases of copyhold, *Cox v. HIGFORD*, tempore Harcourt C. bill brought to be relieved against a forfeiture of a copyhold, in which case Mr. Vernon cited several cases for the plaintiff, (scil.) *THOMAS v. PORTER*, 1 Chan. Cases 95. where relief was decreed in case of *voluntary waste* (Sed vide the case whether the question was voluntary waste or not) *NASH v. THE EARL OF DERBY* 20 Feb. 4 Ann. per Cowper C. Bill to be relieved against a forfeiture of a copyhold by *selling of timber*, there the question was, if the timber was employed in the repairs of the copyhold or not? and after an ejectment brought, and one verdict for the copyholder, and another verdict for the lord, the copyholder was relieved in equity upon payment of the full value of the timber felled, and the costs of law, and in equity, he was restored to the possession of the copyhold.

CUDMORE v. RAVEN in Canc. a *quaker copyholder refused to do fealty*; the lord seized for the forfeiture, and the quaker was relieved. In the principal Case of *Cox v. HIGFORD*, Harcourt C. dismissed the bill, but that was upon the special circumstances, it appearing that there had been 30 years obstinacy in the tenant, and refusal to repair, and do homage, and that the lord had made several offers &c. if he would repair &c.

WHISTLER v. CAGE, per Coventry C. S. a surrender made and presented in court, but a forfeiture insisted on, because the surrender was not made to two tenants of the manor, the plaintiff was relieved paying the fine, and the lord paid costs. *SHELLY v. MASON* per Coventry C. S. a forfeiture insisted on for *leasing without licence*, the copyholder was relieved, and the lord decreed to account for the profits, and restore the possession. *LUCAS v. PENNINGTON*, the Cases of *Cox v. BROWN* and *MARSH v. FULLER* were cited, where an entry for *non-payment of rent* by copyholder was relieved against in this court on payment of the rent.

Counsel

Counsel for the defendants argued, that at law this is a forfeiture, and that two points were to be considered in the case.

1st. If the Court can relieve at all in such a case?

2dly. If it be reasonable to do it in the present case?

This is different from the common case of forfeitures for non-payment of rent or money, which are matters depending on the agreement of the parties, and for which, if a circumstance is slipt &c. a compensation may be made. Here the copyholder is by custom but a tenant at will, and his lease without licence is a determination of his will, and consequently of his estate, so as to relieve here is in effect to relieve against a custom, and totally alter the nature of the copyholder's estate. The Case of COX AND BROWN cited for the plaintiff had special circumstance, the *assignment of the lease* there (which makes the forfeiture) was *made for payment of debts*, and that was the reason the Court there relieved against the forfeiture. The case at law likest to this, is where tenant for life makes a feoffment, or levies a fine, the reason of the forfeiture is, for that the tenant takes upon him to grant a larger estate than his interest will bear. The Case MORGAN V. SCUDAMORE was no more, than whether the lord should be at liberty to set what fine he pleased, or be restrained by the Court where the fine was arbitrary, and the lord was limited by the Court to two years value: As to the Case of THOMAS V. PORTER I Chan. Cases 95. there was some difference about the value of the timber felled, but the Chancellor declared he would not relieve in case of wilful waste, and referred the cause to the bishop, the defendant, though he afterwards directed an issue to try if the primary intention of felling the timber was to do waste, or as the order was worded, to try whether the waste was wilful or not, and the plaintiff was relieved upon the 2d verdict for him: COX V. HIGFORD was of permissive waste.

This case is very strong against relief upon the circumstances of it; for the plaintiff in 1694 made no less than 3 leases without licence, and it is in proof he endeavoured to make a mutiny among the tenants of the manor, by dis- [113] swading the homage from presenting persons who had felled timber, which are very great aggravations in the case.

And as the law is with the defendants, and there are no precedents in equity of relief in such cases, and if there were, these aggravations would exempt this case from those rules, there ought to be no relief here. It was also urged by Mr. Mead for the defendants, that as this case was, the plaintiff was not proper for relief in equity: That this case did not come within any of the rules touching relief against forfeitures in this court. The most general rule that he could find was laid down in COX AND RUSSEL'S CASE 2 Vent. 352. that a forfeiture should not bind where a thing may be done afterwards, or a compensation made for it; as where the condi-

tion is to pay money, or the like, and the relief given in that case was on the want of a circumstance only; and as to the cases of relief against conditions of re-entry for non-payment of rent, and of mortgages forfeited &c. they have gone upon this, that such conditions are as penalties against which this court will relieve; but there are many cases where a Court of Equity will not give relief against forfeitures, as the Case of BERTIE AND LORD FALKLAND, per Somers C. and afterwards in Dom. Proc. *where the condition is precedent* to the vesting of the estate, this court will not relieve against the breach thereof, though in many cases it will relieve against a *condition subsequent* by which an estate is to be divested, because that falls under the rule of compensation, and such conditions are not favoured. So was the Case of FRY V. PORTER 1 Chan. Cases 138. 1 Mod. 300. per Bridgman C. S. assisted with the judges, where relief was refused against the breach of a condition. It is a stronger case here, because *the condition here is annexed to the estate by the law, and not by act of the party*, and if therefore relief should be given in this case, it would be to make a new law; for *by the law a copyholder is no more than a tenant at will, subject to the customs of the manor, which if he breaks, his estate is by law forfeited*. It is true, (according to the Case of FORD AND HOSKINS, Cro. Jac. 368. and WESTWICK'S CASE, 4 Co. 28. b.) that Chancery can alone compel the lord to hold a court for the admission of a copyholder; so this court has relieved where a lord and his steward had by a fraud got a freeholder to be admitted, as by copy of court-roll, as in the Case of HAMMOND V. AINGE, per Parker C. but in the Case of SMITH AND UX. V. DEAN AND CHAPTER OF ST. PAUL'S AND RUGLE, per Jefferies C. and reported in Parl. Cases 67. A bill was brought to compel the lord of a manor to receive a petition in nature of a writ of false judgement to reverse a recovery in the court of the manor, whereby an estate tail was barred under which the plaintiff claimed, the bill was dismissed, and the dismissal affirmed in Dom. Proc. There is no case where a copyholder has come for relief against a forfeiture but upon equitable circumstances, and in this case all the plaintiff's equity is, as he sets it out in his original bill, that the leases were made by mistake &c. and in his supplemental bill, that the leases were made by the under-steward of the manor, and he offers to pay costs at law, and in equity, to be relieved; now as to the pretence of ignorance or mistake, the copyholder is bound to take notice of the tenure at all events. As to the Case of NASH V. THE EARL OF DERBY, there were equitable circumstances, so in the Case of CUDMORE V. RAVEN, of the quaker's refusing to do fealty, and thereupon the lord entered for the forfeiture, probably there were some such circumstances, for the lord might be aware of his persuasion, and might take an unjust advantage, and conditions annexed to copyholds seem in the eye of the law to be different from those annexed to freeholds,

as in the case in *Hardress*; that the king cannot take advantage of the forfeiture of a copyhold estate in case of treason, because the king cannot be admitted as tenant to any lord.

As this case is composed of many ingredients of forfeiture, among which are *voluntary waste, and altering the boundaries, those go to the disinherison of the lord, and the destruction of his estate and manor, especially when, as in this case, they are repeated*, and the cases where relief has been given are generally of one single act of forfeiture, and that extenuated by equitable circumstances, but besides all the rest is in proof here that the plaintiff, Sir Henry Peachy, has excited the tenants at several courts to break the customs of the manor &c. by declaring that they were badges of slavery, and that he was for liberty, and the like. And he mentioned a case cited by Attorney General, as decreed in the Dutchy Court, where they would not relieve against a forfeiture for *plowing up an ancient meadow*, and concluded that this case did not come within the reasons of relief upon the foot of compensation.

Reply by Cheshire Serjeant; He cited the Case in 1 Rolls Abr. 854. *PIERS v. ALEVY AND HOME*, reported in Owen, 641. Le. 126. Husband seised in right of his wife for life of the wife, infeoffs another to the feoffee, his heirs and assigns, ad solum opus et usum of the wife during her life; it is there doubted if this be a forfeiture, because of the last words, (during her life,) which seems applicable to the whole sentence precedent, ut res magis valeat quam pereat, but he submitted supposing that to be a forfeiture at law, if this court would not relieve against it, and put the case of tenant for life levying a fine sur consuance de droit come ceo &c. and declaring the uses of it by deed precedent or subsequent, to be such as tenant for life might lawfully make, if the reversioner in that case should enter for the forfeiture, whether this court would not relieve against it.

Mr. Talbot insisted in his reply for the plaintiff, that there were divers instances of relief given here against the breach of a condition by copyholders, viz. relief given in case of *non-payment of a fine*, that is, relief against the breach of a condition in law. In the Case of *Cox v. HIGFORD* there was this circumstance against the plaintiff, that he came here for relief after the lord had been 9 years in possession under the forfeiture, and though the lease by the copyholder be a disseisin to the lord, yet it is so but at his election, and the fine for the lease is capable of being ascertained so as the lord may have a recompence.

As to the objection that the lease is a determination of the will of the copyholder, and consequently of the tenancy, it is possible when the tenants were mere tenants at will it might be so understood, but time and judicial determinations have changed the nature of their interest, and they have something very near, if not properly an inheritance, and as to the case

of tenant for life making a feoffment, it is hard to imagine that he can do it without intending to prejudice the inheritance, which may therefore incapacitate him for relief, but a copyholder that looks upon himself as owner of the inheritance on such grounds, cannot be supposed to have any such view in leasing, especially when the lease takes notice that the lands are copyhold, as in the present case, and since the lease is only a disseisin to the lord at his own election.

[117] Resolutio curiæ ; A copyholder is considered at law as a tenant at will to all purposes, except the continuance of his estate, but it is true, there have been many favourable resolutions for the benefit of the copyholder, by which he has got an established estate, and the lord cannot determine his will otherwise than as the custom allows; formerly the tenant was to perform all his services while he continued tenant, which was at the lord's will, but the will cannot now be determined but where the custom doth allow it so to be, and in the case of tenant's making a greater estate than he lawfully may, that doth determine his will; for it is an usurpation upon the right of the lord, and the cases of tenant for life leasing *pur auter vie*, or tenant for a great number of years leasing for life, have been held forfeitures, not from any notion of their intending damage to the inheritance, but as it is a quitting or disclaiming their ancient right which is thereby determined, and this is the case here. Now the question is, What there is to relieve upon in equity in this case? To say this is a hard law is to repeal it here; it has been admitted on the part of the plaintiff, that in the case of waste, where the place wasted and treble damages are recovered, there can be no relief, though the treble damages are more than a sufficient recompence to the reversioner, but that they say is by a statute law; it is true, but there is no difference in a common law case, if there were, it would confound the law; it is true, in cases where the condition annexed is as a security to have a thing done, this court can relieve in case of non-performance, because the thing may be done though not perhaps at the same day or place &c. the party for whose benefit the thing is to be done has all that he in conscience can ask, but this case cannot come under the notion of a compensation, the lord here is not hurt, so cannot be made amends; but it stands on the foot of the nature of the tenants estate. This court has relieved against forfeitures for non-payment of a fine, or of rent by the copyholder, the forfeiture there is considered only as a security to the lord for his fine, or his rent, and the thing is done in effect and made up as advantageously for the party, though it varies in circumstance of time, place, or the like; nor can the law in this case of forfeiture be called a harsh law for the copyholders, because it has given them in other things so many advantages &c. This case is stronger than any that have been mentioned, it makes nothing for the plaintiff that the lord's stewards was a witness to the lease,

lease, for it is not pretended that he was so with the Duke of Somerset's notice, and the plaintiff indeed put confidence in him, but not the defendants, and it would be strange if his acts should be construed to prejudice those who did not trust him; here have been no less than 3 leases made at different times, and it will not avail that it is taken notice of in the leases, that the lands are copyhold, so long as the ground of the forfeiture is the tenant's granting a larger estate than he can grant without licence from the lord, and it is certain that a repetition of the act would in time destroy the manor, and the plaintiff's discourses (which are proved) exciting the tenants to get rid as it were of their base tenure, is a circumstance against him. I see no equitable circumstance in this case to vary it from what it would be at law; it was proper enough for the plaintiff to come here to discover what were the forfeitures insisted on, that he might be prepared at a trial to defend against them, but now that discovery is had it is merely at law upon the question, forfeiture or no forfeiture? I cannot relieve the plaintiffs.

[E. c] *What Act or Thing shall be a Forfeiture.* [118]

[1.] *F* a copyholder comes into court, and says he renounces his copy, this is not any forfeiture. M. 37 El. B. so held.] This in Roll is letter (D) in fol. 507.

(F. c) Forfeiture by Mifeasance:

1. *FORGING* new customs is a forfeiture, for it tends to the disherison of the lord. Arg. Het. 7. cites D. * 228. 3 Le. 106.
Pl. 158.
Trin. 26
Eliz. B. R.

Taverner v. Cromwell, S. P. argued, but at length the court wished the jury to find the special matter, and to refer the same to the court whether it was a forfeiture or not. — * This seems misprinted.

2. *Outlawry* is no determination or forfeiture of copyhold estates. Het. 127. cites it to have been so adjudged 44 El.

3. If a copyholder in presence of the Court speaks irreverent words of the lord, as that the lord exacteth and extorteth unreasonable fines, and undue services, this is finable only, but no forfeiture; and if he says in court, that he will devise a means no longer to be the lord's copyholder, this is neither cause of fine nor forfeiture; for perhaps the means that he intended was lawful, viz. by passing away his copyhold; et ubi sensus verborum est multiplex, verba semper sunt accipienda in meliori sensu. Co. Comp. Cop. 64. f. 57.

4. If a steward shews a court roll to a copyholder to prove that his land is holden by copy, and the copyholder says he is a freeholder, and shews a deed pretending thereby to procure his land to be freehold, and tears in pieces the court roll, this is a forfeiture ipso facto. Co. Comp. Cop. 64. f. 57. Calth.
Readings
67. S. P.

5. A forfeiture is not induced by any collateral thing, but by some act that is a disinherittance to the lord, and therefore an act that makes a forfeiture ought to be against the custom; for his estate is fixed by the custom as long as he does the services and observes the customs. Het. 7. Paich. 3 Car. Arg. in Case of Paston v. Manne.

Het. 5. Paston v. Manne, S. C. and the court said, it is to be presumed, that all the land was made better by this inclosure if it be not expressly alleged, to be contrary sed adjournatur.

6. The forfeiture of a copyhold is always by something done to the copyhold land itself, so a copyholder inclosing part, where the lord by custom claims a fold-course over the lands of his copyholders, is no forfeiture, because this is fold-course of the lord's which is no copyhold, and it is better for the copyhold, and makes the land better, and more beneficial for the lord; and this fold course is a thing that commenceth by agreement, and it is but a covenant and not a common right, and forfeitures (which are odious) shall be taken strictly for the lord. Hutt. 102. Pasch. 5 Car. Pastor v. Utbert.

7. Defacing of landmarks is a forfeiture. Gilb. Treat. of Ten. 228.

[119] [G. c] Forfeiture by Misfeafance; As Making Leafes.

This in Roll is (D) pl. 7. in Fol. 507.

Cro. E. 498. pl. 19. S. C. and S. P. held by all justices to be a forfeiture when there is not any custom to warrant it. For he

has no authority by law to make such estate; and though this is a lease to begin at a future day, and the lessee has not entered, yet it is a forfeiture presently; for it is a good lease between the parties. — Mo. 392. pl. 508. S. C. and S. P. agreed by all that it was a forfeiture, whether the lessee had entered or not because it was an illegal contract made to the disherison of the lord. — Supplement to Co. Comp. Cop. 74. f. 9. cites S. C. and S. P. accordingly, though the lease is good as between the parties. — Roll. Rep. 75. Mich. 12. Jac. Coke Ch. 9. cites it adjudged in C. B. in Willows's Case, that a fine of 51. imposed upon a copyholder for admitting him, the copyhold being but of the value of 30s. a year, was very outrageous, and consequently void. — Gilb. Treat. of Ten. cites S. C. that it is a forfeiture, because of the unlawful contract made to the lord's disherison.

This in Roll is (D) pl. 8.

* Fol. 508.

Bulst. 215. Luttrell v. Weston S. C. adjudged accordingly.

And Ibid. Fleming Ch. J. said, that if he had reserved a month at the end of every year, it would have been all one as reserving a day, and a forfeiture clearly. — Cro. J. 308. pl. 5. S. C. adjudged per tot Cur. without argument.

[2. If a copyholder leases his copyhold to another, to have and to hold to him for one year, and so from year to year during the life of the lessor, reserving to the lessor in every year the 25th day of March, this is a * forfeiture; for this is a lease for two years at least, reserving one day; so that a greater estate than for one year passes in interest, and the reserving a day in every year is but a shift to avoid the forfeiture. Mich. 11 Jac. B. R. between Luttrell and Westover.]

[3. *If a copyholder that may lease for three years by the custom, leases for three years, and so from three years to three years, till nine years, this is a forfeiture, for this is a lease for six years at the least.*, P. 1 Jac. *Wilcock's Case* adjudged.] This in Roll is (D) pl. 9.

[4. *If a copyholder for life agrees to make three several leases by indenture, one to commence after the other, there being two days between the end of the first and the commencement of the second, and so between the second and the third, and after he makes them accordingly, and seals them at one time, this is a forfeiture, for this is an apparent fraud, and a greater estate than for one year passes presently.* M. 7 Car. B. R. between *Mathews and Wheaton*, adjudged upon a special verdict, I myself being *de consilio querentis*, intratur Hill. 4 Car. Rot. 496.] This in Roll is (D) pl. 10. —Cro. C. 233, 234. pl. 15. S. C. adjudged — Jo. 249. pl. 3. S. C. adjudged. — *Lease for a year and sic de anno in annum*

during the life of the copyholder, *excepting one day at the end of every year*, for the copyholder to enter, and this only to avoid a forfeiture, this is a forfeiture. 1 Bull. 215. Trin. 10 Jac. *Luttrell v. Weston*. — *Flemming*. Ch. J. said, that if he had reserved a month at the end of every year, it would have been all one as reserving a day, and a forfeiture clearly. Bull. 215. S. C. — Cro. J. 308. pl. 5. S. C. adjudged. — *Gilb. Treat. of Ten.* 218. cites S. C. and says it was adjudged, that the second lease was a forfeiture; for it is not warranted by custom, and so being out of the custom, it is, as every other lease for years, a forfeiture; for though it be not to commence till after the first lease ended, yet the land is charged with a double interest, one in present, the other in futuro, which is against the custom, and so a forfeiture. 2dly. It was adjudged this lease was void against the lord who had the land by the surrender, and when the lord enters by force of the surrender, he is in by title paramount the lease. [120] But it seems the first lessee shall enjoy his lease, or else it were in the power of the lord to defeat his own grant; there is nothing said of this, but the case in Roll is, that leases were executed at one and the same time, and then the lessee, being particeps criminis, may perhaps forfeit; and as the case is reported by the rest, the lease was made to him to commence in reversion, and so he is as much party to the wrong as in the other way; and so it seems the lord may enter presently. — See (T. c) pl. 5. S. C. and the notes there.

[5. *If a copyholder makes a lease for years by licence of the lord, the lessee may assign it over, or make an under lease, without any new licence, for the interest of the lord was discharged by the first licence.* P. 12 Jac. E. between *Johnson and Smart*, per Curiam.] This in Roll is (D) pl. 14.

6. A copyholder makes a lease either for life or years of his copyhold lands, which is *not warranted by the custom* of the manor; now although such lease shall be a good lease betwixt the copyholder and his lessee, and he shall not avoid his own lease, yet as unto the lord it is a forfeiture of the copyhold and of his estate, and the lord shall take advantage of such forfeiture, and may enter upon the lands leased. Supplement to Co. Comp. Cop. 74. f. 9. cites 4 Rep. *Murrell's Case*.

7. A lease for years of copyhold lands by indenture, or by parol, is a forfeiture unless there be an express custom to warrant it, and that custom must be *time out of mind*. Cro. E. 351. pl. 3. Mich. 36 and 37 Eliz. B. R. *Jackman v. Hoddeston*.

8. Copyholder made a lease for 3 lives, and livery, and the survivor of the 3 continued in possession 40 years, but because no livery appeared on the deed to have been made, it was no forfeiture of which the king who was the lord could take any advantage. Godb. 269, pl. 374. Mich. 5 Jac.

But a lease for one year, and so de anno in annum during 10 years is clearly a good lease for 10 years, and so a forfeiture.
Ibid. —

9. If a copyholder makes a lease for 1 year, according to the custom, and covenants, *that after that year ended he shall have another year*, and so in this manner de anno in annum during the space of 10 years; this is no such lease as will make a forfeiture of his copyhold estate, for that he has no lawful lease here but for 1 year only, and it is only by way of covenant, agreed per tot Cur. Bulst. 190. Pasch. 10 Jac. Hamlen v. Hamlen.

Cro. J. 301. pl. 6. Lady Montague's Case S. C. and same points accordingly. — Supplement to Co. Comp. Cop. 74. f. 9. cites S. C. — Gilb. Treat. of Ten. 219. cites S. C. but says quare, and see the book; for the words *covenant and grant* make a lease &c. but in another case it was hold, that these words by construction might make a lease where the lands might be let; but otherwise where the lands could not be let, which distinction seems very reasonable; for the words themselves do not import a lease, and would be a very injurious construction to make them a lease, and so a forfeiture, when they only import of themselves a covenant. — A lease, that will make a copyholder forfeit his estate, ought to have a certain beginning and end, or else it is a void lease, and can convey at most but an estate at will, which is no forfeiture. Gilb. Treat. of Ten. 218. cites S. C. and S. P. per tot Cur.

Supplement to Co. Comp. Cop. 74. f. 9. cites S. C. but if he had been a copyholder in fee, it had been a forfeiture of his estate to have

10. A. copyholder for life hath licence of the lord to make a lease for 5 years, if he live so long, and makes a lease for 3 years without limitation, yet it is no forfeiture of his estate, because the lease without any such limitation to the estate shall determine by the death of the lessor, and therefore not material, but if it had been with a limitation, that if J. S. had lived so long, that peradventure had been material; wherefore it was adjudged for the plaintiff. Cro. J. 436, 437. pl. 7. Mich. 15 Jac. B. R. Worledge v. Benbury.

made such an absolute lease, because he had done more than he was licenced to do by the law; and so it was adjudged in Hall and Arrowsmith's Case, which see in Popham's Rep. 185.

[121]

Godb. 364. pl. 456. S. C. argued, sed adjournatur. — Jo. 157. pl. 2. S. C. adjudged, and this judgment affirmed by all the justices and barons in the Exchequer Chamber. — Lat. 199. S. C. agreed that it was no disseisin to the lord, and adjudged that the lease was not void, but the lessee had judgment against the infant.

11. Infant copyholder in fee leases for years without licence, rendering a rent; and at full age he accepts the rent, and afterwards his lessee, who brought an ejectiōne firmæ and agreed by the Court. 1. That a lease for years by a copyholder, although that it be a forfeiture, yet it is no disseisin to the lord. 2. That the lease is not void but voidable, and may be affirmed by acceptance and judgment for the lessee for years. And agreed that such a forfeiture does not bind an infant. Noy. 92, 93. Trin. 2 Car. B. R. Ashfield v. Ashfield.

If the copyholder make a lease it is a forfeiture, yet it is no disseisin to the lord, which is plain from the cases that say such a lease is good against every body but the lord, for it could not be a lease at all if it were a disseisin; it is a forfeiture, because the copyholder has broke the custom of the manor, by bringing in a tenant without any admittance, but it is no disseisin in favour of the lord since the copyholder hath such estate as may last much longer than the lease, and not a bare lease at will. Gilb. Treat. of Ten. 217, 218.

12. A. copyholder for life being indebted 100l. and one P. S. being bound with him for the debt, A. executed a Deed to P. by which he did covenant, grant, and agree with P. &c. that he should have and enjoy his copyhold lands for 7 years, and so from

7 to 7 years, for and during 49 years, if A. should so long live, but to be void, if the said 100l. was paid by A. &c. It was insisted, that this was not a lease so as to entitle the lord to a forfeiture; the word (covenant) or the words (to have, hold, and enjoy) in case of freehold will make a lease, but if construing it to be a lease will work a wrong, then it is only a covenant, and no interest vests, therefore this being in the case of a copyhold, shall never be construed to be a lease, because it would work a wrong both to the lessor and lessee, for the one would forfeit the estate, and the other would lose his security; the Court inclined that it was a good lease, and consequently a forfeiture of the copyhold, that the meaning of the parties must make construction here, and that seems very strong that it is a good lease; but they gave no judgment. 2 Mod. 79. Pasch. 28 Car. 2. C. B. Richards v. Seely.

(H. c) Forfeiture. Making Leases exceeding the Licence.

1. **L**ORD grants a licence to his copyholder to *grant a lease for 20 years* from Michaelmas next, and the copyholder *makes a lease to C. and afterwards (but before Michaelmas) makes another lease to B. for 21 years* each by indenture; the justices doubted, if making the second lease be a forfeiture, but Anderson Ch. J. thought it a forfeiture. Mo. 184. pl. 329. Mich. 26 Eliz. Anon.

The justices said that the second lease is void in interest, and goodbye estoppel, but if the lord being a

stranger to the estoppel may affirm this lease against the lessor is the doubt. Ibid. — Sed quære, for the lease was void in point of interest, and only worked by way of estoppel betwixt the parties, and if no interest passed, how could it be a forfeiture; yet had the first lease been surrendered, the second lease would have taken effect, and then the land had been charged with a lease without licence, but till that happened the land was charged with nothing in point of interest, and this not like the case of a future lease, for there the land is bound presently, and though this may happen to be a charge, yet the supposition is foreign, and ought not to be intended to work a forfeiture. Treat. of Ten. 220.

2. Lord licences his tenant to make leases for 21 years, tenant [122] makes 2 leases to two several persons for the term, if the lord may affirm the 2d lease against the lessor is a doubt, Mo. 184. pl. 329. Mich. 26 Eliz. Anon.

3. There is a difference between a copyholder in fee and a copyholder for life, for if the lord licences his copyholder in fee to make a lease for 3 years, if he live so long, and he makes a lease absolutely, this is no forfeiture; for this lease shall be a good interest against the heir of the copyholder, but otherwise of a copyholder for life and in both cases the condition is void, and the lessee is in by the copyholder, and not by the lord. Ow. 73. Hill. 38 Eliz. B. R. * Haddon v. Arrowsmith.

This proves that the heir is in by descent, and not by his admittance; he may have trespass, ejectment, or may surrender before admittance. Arg.

3 Lev. 387. in case of Glover v. Cope. — * Poph. 105. S. C. reports this point just vice versa, viz. that a lease so made by copyholder in fee absolutely where the licence was limited, had been a forfeiture, because he did more than he was licensed to do; but a lease so made by copyholder for life makes no forfeiture, and they agreed, that such a licence cannot be made void by condition

tion subsequent to undo that which was once well executed, but there may be a *condition precedent* united to it, because in such case it is no licence till the condition is performed, but the licence before mentioned is not a conditional licence, but a *licence with a limitation*, and therefore had not been of force if the limitation which the law makes in this case had not been, and the limitation in law is preferable to a limitation in deed, where they work to one and the same effect, and not different. *Hall v. Arrowsmith, S. C.*—If *copyholder for life hath licence to let for 3 years* if he so long lives, and he leases for 3 years absolutely, it is no forfeiture of his estate; but otherwise in case of a *copyholder in fee*. *Poph. 105. Hill. 38 Eliz. Hall v. Arrowsmith.*—*Gilb. Treat. of Ten. 280.* cites *S. C. & S. P.* accordingly, but says it is otherwise had the copyholder had a fee and the limitation had been during the life of a stranger.——The words (if he lives so long) are but to shew how long the lease is to continue, which is no more than what the law appoints, and so it is good enough, and they are but words of surplusage and no more than + what the law says, and if they had been inserted in the lease it would have been in vain; had it been in the case of a copyholder in fee it had not been warranted by the licence, for then the intent would be to give him licence, but *not to hurt the heir, and without those words in the lease the heir should be bound, and the lease good*; but it is otherwise of a copyholder for life, for the law without these words determine the lease by his death. *Cro. E. 461. 462. pl. 8. S. C.*

+ *S. P.* But if it had been with a limitation, *if J. S. had lived so long*, that perhaps had been material. *Cro. J. 437.* in case of *Worledge v. Benbury*.

[I. c] Forfeiture by making a Grant &c. as at Common Law.

This in Roll is (D) pl. 11. in fol. 508. —If a copyholder *bargains and sells the copyhold* to another *in fee*, and after the deed is not inrolled, yet this is a forfeiture, for it would have determined a lease at will, being made by a lessee at will. *Contra M. 38, 39. Eliz. B. R.* [1. *If a copyholder bargains and sells by deed indentured and inrolled* it is no forfeiture of his copyhold, of which the lord can take any advantage. *Godb. 269. pl. 374. Mich. 5 Jac.* in the Exchequer, cites it to have been so adjudged in *London's Case*.—Supplement to *Co. Comp. Cop. 76. f. 10.* cites *S. C.* accordingly; because the copyhold did not pass by the deed.——And in that case it was cited to be adjudged in *London's Case*, that if a copy-tenant doth bargain and sell his copy-tenement by deed indentured and inrolled, that the same is no forfeiture of the copyhold of which the lord can take any advantage; and so it was holden in this case. *Godb. 269. pl. 374. Mich. 5. Jac. Anon.*

This in Roll is (D) pl. 12. —If he makes a charter of feoffment, or a deed of demise for life, but makes no livery, this is no forfeiture, because nothing passes, and therefore no alienation, but otherwise it is of a lease for years. *Co. Litt. 59. a.*—*Gilb. Treat. of Ten. 220.* cites *S. C.* and says, that by a lease for years an interest passes *by the delivery of the deed, and therefore it is a forfeiture.——*Gilb. Treat. of Ten. 320.* cites *S. C.* [*123] [2. *So if a copyholder makes a deed of feoffment with a letter of attorney to make livery*, though livery be not made accordingly, yet this is a forfeiture.]

This in Roll is (D) pl. 13. —*S. P.* by *Clench J.* 3 Le. 109. —*Gilb.* [3. But otherwise it seems it is if it be *without a letter of attorney*, for it rests in him at all times to perfect it, and so his will is not perfected till it is done. *Mich. 38. 39 El. B. R. Co. Lit. 59.* as it seems it is to be intended.]

Treat. of Ten. 320. cites *S. C.*—It was adjudged in the Exchequer, that where the king was lord of a manor, and a copyholder within the said manor made a lease for 3 lives, and made livery, and afterwards the survivor of the 3 continued in possession 40 years; and in that case, because that no livery did appear to be made upon the endorsement of the deed, (although, in truth there was livery made) that the same was no forfeiture of which the king should take any advantage. *Godb. 269. pl. 374. Mich. 5 Jac. Anon.*

4. Entry en le post against an abbot, who said that his predecessor leased the tenements to the demandant, habendum at

at will, by copy, who enfeoffed the demandant, by which the abbot entered for alienation to the disinherittance of his house, and admitted for a good bar, by which the demandant said, that his grandfather was seised in fee, abque hoc that the predecessor leased prout &c. Br. Entre en le Per pl. 33. cites 11 H. 4. 83.

5. A *surrender by tenant for life to the use of another in fee*, is not any forfeiture, for it passes by surrender to the lord, and not by livery. 4 Rep. 23. a. pl. 4. Pasch. 35 Eliz. B. R. in Case of Bullock v. Dibley.

Mo. 753.
pl. 1037.
Hill. 1 Jac.
S. P. —
Supplement
to Co.

Comp. Cop. 76. f. 10. cites S. C. but states it, that besides the surrender he made livery of the land, and that it is no forfeiture for the reason above. — Such surrender in fee is no forfeiture, because the surrenderee comes in by admittance, and the lord hath dispensed with him. Cart. 238. per Cur. Hill. 16 & 27 Car. 2. C. B. Bird v. Kirkby. — Gilb. Treat. of 178. cites Bullock v. Dibley, that it is no forfeiture; for it may be seen by the court rolls who is tenant, and so the stranger is at no loss to sue.

6. Tenant by copy cannot *alien* his land by deed, for then the lord may enter as into a thing forfeited to him. Litt. f. 74. But when a man has but a right to a copyhold, he may *release* it by deed or copy to one that is admitted tenant, de facto. Co. Litt. 59. a.

7. The making of a deed alone, unless *some thing pass thereby*, is no forfeiture; as if he makes a charter of *feoffment*, or a deed of demise for life, and makes *no livery*, this is no forfeiture; because nothing passes, and therefore no alienation; but otherwise it is of a *lease for years*. Co. Litt. 59. a.

8. If a *copyholder for life surrenders in fee* this is no forfeiture, because it did not pass by livery. Co. Comp. Cop. 64. f. 57.

9. If a *copyholder for life suffers a recovery* by plaint in the lord's court *as copyhold of the inheritance*, this is a forfeiture ipso facto. Co. Comp. Cop. 64. f. 57.

A. Tenant
for life of a
copyhold,
remainder
to B. in fee.

A. *suffers a common recovery*. Resolved per tot. Cur. that without a particular custom this is no forfeiture of the estate, but if it be, it is the lord and none else that can enter. 2 Mod. 83. Pasch. 27 Car. 2. C. B. in case of Kren v. Kirby. — Cart. 237 Bird v. Kirkby, S. C. & S. P. held accordingly per tot. Cur. — Freem. Rep. 192. pl. 196. Kirkby's, alias, Kirk's Case S. C. says it was conceived, that the suffering a recovery in fee was a forfeiture of the estate for life; but that the lord should hold it during the life of him that committed the forfeiture. — Mod. 199. pl. 31. Bird v. Kirk S. C. & S. P. held accordingly; for the freehold not being concerned, and it being in a court baron where there is no estoppel, and the lord who is to take the advantage of it, if it be a forfeiture, being party to it, it is not to be resembled to the forfeiture of a free tenant, and that customary estates have not such accidental qualities as estates at common law have, unless by special custom. — Gilb. Treat. of Ten. 220. cites S. C. but says it was otherwise adjudged in the case of Bird v. Keck *ideo quære*.

10. If a copyholder makes a *feoffment of all his lands in dale*, [124] and makes livery in charter lands, no part of his copyhold land is thereby forfeited; but *if livery be made in any part of the copyhold land*, all his copyhold lands are forfeited. Co. Comp. Cop. 65. f. 58.

11. If a copyholder *by deed of bargain and sale inrolled according to the statute, doth bargain and sell all his lands in dale*, having both copyhold and freehold, his copyhold is not there-
by

This case cited out of Lat. is misprinted and should be Lat. 227. Mich. 3

Car. Cornwallis v. Horwood, or Hammond.

9. A copyholder suffered a house to fall, and repaired it; yet held to be a forfeiture, and it is not like to waste at common law, for there if it be repaired before the jury hath view, it is well enough; Skin. 211. in Poole and Archer's Case, cites Lat. 277. & Palm. 417.

—Palm. 417. Pasch. 1 Car. B. R. the S. C. but I do not observe S. P.

10. Pulling down a ruinous house is a forfeiture, unless there is a custom to the contrary, because waste lies not against a copyholder, and yet the lord in favour may amerce such a copyholder if he will. Arg. Het. 6 Pasch. 3 Car. C. B.

Gilb. Treat. of Ten. 221. cites S. C. accordingly. —Het. 8.

in case of

Pafton v. Manne S. C. cites the opinion of Popham D. 361. pl. 12. 30 Eliz. that is not waste. —Hutt. 103. in S. C. cites D. 361. Altham's Case.

Gilb. Treat. of Ten. 221. cites S. C.

12. Converting part of the land into piscary by a copyholder is a forfeiture; per Hutton J. and it was not denied. Litt. R. 268. Pasch. 5 Car. C. B.

This in Roll is (D) pl. 6. in fol. 5c7.

—Gilb. Treat. of Ten. 221. cites S. C. accordingly; but says that then it seems that

this house must be subject to all the customs of copyhold land; and therefore if he pulls it down again it is a forfeiture; —Litt. Rep. 266. Arg. cites 8 Jac. B. R. Brooke v. Bee, where a copyholder built a new house upon part of the land, and was adjudged a forfeiture; for though the land is better, yet it is in another kind, and cites 22 H. 6. that if lessee alters his house, and makes it bigger, and takes timber for it, it is waste; but it was resolved there, that if he betters the land in the same kind it is no forfeiture or waste. —Hutt. 103. Arg. says that it was adjudged in Brooks's Case at the first coming of Popham to be Ch. J. that building a new house is a forfeiture, because it alters the nature of the thing, and puts the lord to more charges.

So where a tenant for life built a new house where none

was before, and without laying 4 acres of freehold land to it, and so within the statute of cottages, and after his death reverfioner pulled it down, this is a forfeiture. Bullst. 50. Mich. 8 Jac. adjudged. Brock v. Beare. —If a copyholder builds a house, but it is not covered, it is no forfeiture to pull it down, for till it is covered it is not a house; per Fenner J. Bullst. 50. —S. P. by Popham Ch. J. Poph. 14.

Het. 5. S. C. but no judgment.

3. A copyholder may hedge and inclose, but not where it was never inclosed before; Winch. 8 Pasch. 19 Jac. cites it as said by Hobart in Pafton's Case.

4. If

[L. c] Forfeiture by Building, or Inclosure.

[1. IF a copyholder erects a new house upon a copyhold without licence, this is no forfeiture, for this is for the improvement of the tenement, though he alters the nature of the land by it; and this is not waste in the lessee for years. Pasch. 38 Eliz. B. R. between Cecill and Cave.]

4. If copyholder *erects a mill* upon his freehold it is a forfeiture. D. 211. b. Marg. pl. 13. cites [Trin. 1 Car. Gray v. Ulysses.]

Per Doderidge J. Lat. 123. in case of Gray v. Ulysses S.P. 893. Pasch.

——— If a mill be set upon poss. no waste lies for it; adjudged 4 Le. 241. pl. 8 Jac. B. R. Ward's Case.

5. *Inclosure* of land with gaps in which the lord has a fold-course for 500 sheep is not a forfeiture; for it is a thing *collateral to the land*, and a forfeiture of a copyhold is always by some thing done to the copyhold land itself, and this fold-course is a thing which commences by agreement, and is but a covenant, and not a common right, and forfeitures are odious in the law, and shall be taken strictly, and all the Court were of opinion, that this is no forfeiture. Hutt. 103. Pasch. 5 Car. Paston v. Utbert.

[127]
Hill. 5. Paston v. Manne S. C. argued. The court said, that it is to be presumed, that all the land was bettered by this inclosure, unless it be ex-

pressly shewn to the contrary; sed adjournatur. — Litt. Rep. 264. S. C. resolved. — Gilb. Treat. of Ten. 227, 228. cites S. C. that because there was a custom to fine for such inclosure it is no forfeiture; but if there had been no custom to fine it seems it is a forfeiture, because there is no other remedy.

(M. c) Forfeiture. By Crimes. Conviction, Attainder, &c.

1. IF a copyholder be *outlawed or excommunicate*; that the lord may have the profits of his copyhold land, a presentment is necessary. Co. Comp. Cop. 64. f. 58.

2. The custom of a manor was, that if a copyholder commits felony and it be presented by 12 homagers, that the tenant should forfeit his copyhold; such presentment was made against A. but afterwards at the assizes A. was acquitted; the lord seised the copyhold; it was adjudged no good custom, because in judgment of law, before attainder it is not felony. Godb. 267. pl. 370. Hill. 6 Jac. C. B. Paginton alias Packington v. Huet.

Supplement to Co. Comp. Copyholder, 84. f. 19. S. C. accordingly. — Bull. 13. Hill. 7 Jac. Gitting v. Cooper. S. P. and seems to be S. C. and as to the first point adjudged clearly a good custom, viz.

3. Another point was, whether the *special verdict*, agreeing with the presentment of the homage, that A. had committed felony, did intitle the lord to the copyhold notwithstanding his acquittal, quære; for it was not resolved. Godb. 267. pl. 370. Hill. 6 Jac. C. B. Paginton alias Packington v. Huet.

that if any copyholder commits felony, he shall forfeit to the lord his copyhold, and that the lord upon presentment of this by the homage may enter and seise the same, but whether the verdict and acquittal should conclude the lord of his entry the court delivered no opinion, but curia advisare vult, and the parties submitted the matter to Williams J. — 2 Brownl. 217. S. C. accordingly. — Gilb. Treat. of Ten. 227. cites S. C.

4. Copyholder convicted of felony has clergy allowed before attainder; the Court inclined strongly that it is no forfeiture without *special custom*, but on the importunity of counsel it

Conviction of felony and presentment there-

of by the jury was held a forfeiture of the copyhold estate, there being a custom found, that the lord may feise. *Le. 1. Borneford v. Packington.*—S. C. cited *Le. 263.* and distinguished the case there from this case of *Jory v. Pawly*, because there was a *custom found* which was not found here.

Le. 263.
S. C. but
S. P. does
not appear.

5. An *outlawry of felony* is an attainder, and in case of copyholds the *land goes to the lord*, and not to the king, and the custom is good cause to feise, but shall ensue the trial of the fact, and on acquittal is discharged. Per Keeling Ch. J. to which the crown agreed. 2 *Keb. 466, 467.* pl. 51. *Hill. 20 & 21 Car. 2. B. R. in Case of Jory v. Pawly.*

[128]

6. By attainder of felony the copyhold estate for life is absolutely determined, so that afterwards the person attainted is *no copyholder*, nor can be of the *homage*, or *take a surrender out of court.* 2 *Jo. 189, 190.* *Hill. 33 & 34 Car. 2. B. R. Benison v. Stroud.*

Skia. 8, 9.
pl. 9. S. C.
Pemberton
Ch. J. held,
that entry
was not ma-

terial, but that the estate would be in the lord presently without feiture. *Curia advisare vult.*—3 *Lev. 94.* *Strode v. Dennison* S. C. adjudged that the estate for life was determined by the attainder, the copyhold being only a tenancy at will, the attainder determines his will, and though the lord does not enter, and the king pardons the felony, yet he in reversion for life may enter. Adjudged in B. R. and affirmed in *Cam. Scacc.*—2 *Show. 150.* pl. 123. *Benison v. Strode* S. C. adjournatur.

8. It seems, if a copyholder *commits felony or treason, he forfeits to the lord, without any particular custom*, else a felon would have no punishment in his posterity, if he had copyholds of never so great value. Coke in one place says, if a copyholder commits felony or treason, he forfeits his copyhold presently; in another place he says he forfeits upon presentment; and in a 3d place he says the lands escheat to the lord. In none of these cases he mentions any custom, but speaks generally; it is a forfeiture presently before indictment or attainder, as it seems, because the custom will not, in favour of a felon, support an estate at will, but let the lord determine it, as in case of any other estate at will, the law will not give his estate to the king, because then the lord would lose his services. *Gilb. Treat. of Ten. 226, 227.*

[N. c] Forfeiture by Non-feasance; Not coming in on what Summons or Notice. And how Advantage may be taken of it.

This in Roll
is (C) pl. 7.
in fol. 506.
* Roll Rep.

[1. IF a copyholder makes a voluntary and obstinate abstraction of his suit from the court of the lord upon sufficient warning, this is a forfeiture; My Reports, 14 Ja. * Buttevant

Dant and Pickstaff adjudged. M. 13 Ja. B. R. between *†* 429. pl. 21.
Southcot and Adams, per Curiam.] S. C. ad-
judged.—
3 Bullf. 268.

Hammond v. Wernibank S. C. adjudged.

† Roll. Rep. 256. pl. 24. S. C. & S. P. per Cur. — 3 Bullf. 80. *Belfield v. Adams* S. C. & S. P. admitted.

[2. If the lord gives a *particular summons* to every particular copyholder, *that he will hold a court at a certain place, at a certain time*, if any of them do not come at the day, this is a forfeiture. 23 Eliz. Sir *Christopher Hatton's Case* adjudged; cited P. 38 Eliz. B. R. in *Crisp and Frier's Case*.] This in Roll is (C) pl. 6.
Fol. 507.
Cro. E. 506.
in pl. 30.

Crisp v. Fryer cites S. C. against his tenants of Wellingborough, and S. P. agreed there per Cur. — Mo. 350. pl. 468. S. C. & S. P. cited, but says not whether the summons was particular or general. — Noy 58. S. C. & S. P. cited — Sty. 241. cites S. C. — S. P. admitted per Cur. 3 Bullf. 80. Mich. 131 Jac. — Ibid. 268, 269. S. P. admitted per Cur. — But in Sir Christopher Hatton's Case it was agreed that if he excuse could his not coming upon any good cause as sickness &c. it should save the forfeiture. Cro. E. 506. — Gilb. Treat. of Ten. 215. S. P. and says that if a copyholder be in debt, and is afraid of being arrested, or is a bankrupt, and keeps house, these are good excuses.

[3. But *otherwise* it is upon *general summons*, for there perhaps the tenant never had notice thereof. 23 El. Sir Christopher Hatton's Case, held M. 5 Jac. B. between *Farrer and Woodhouse*, per Curiam, upon a *general summons in the church, according to the custom*. Coke's Entries 288. between *Taverner and Cromwell*, adjudged, where a general summons in the church without alledging a custom to summon a court in the church.] [129] This in Roll is (C) pl. 8. — *Refusal to perform services, or a wilful absence from court, are causes of forfeiture, but in the last case the*

summons ought to be personal, or at his house, or it ought to be averred that he had notice, and 4 days notice was held sufficient, though Walmesley thought there ought to be 14. Cro. E. 353. pl. 10. Mich. 36 & 37 Eliz. C. B. *Taverner v. Lord Cromwell*. — Godb. 142. pl. 176. Hill. 36 Eliz. Anon. seems to be S. C. & S. P. per tot. Cur. and to that purpose was cited the case of Lord Dacres v. Harleston. — Le. 104. pl. 139. Mich. 30 Eliz. B. R. *Braunch's Case*, held per tot. Cur. that general warning within the parish is sufficient; for if the tenant himself be not resistant upon his copyhold, but elsewhere, his farmer may send notice of the court to him. — Non-appearance at court after summons is a forfeiture of the copyhold, but without warning it is no forfeiture, but only negligence; and after summons it is a forfeiture without an express refusal, as in case of rent; for the consequence is more fatal in this case, because without the copyholder's attendance there can be no court. Gilb. Treat. of Ten. 215. — And ibid. says, that the opinion that there must be a personal notice is most reasonable; for as 4 days notice has been adjudged a sufficient time of holding a court, how can a copyholder be summoned in that time that lives 200 miles off?

4. If a copyholder dies, his heir *within age*, the heir is not bound to come to any court during his nonage to pray admittance, or to tender his fine; and if the death of his ancestor be not presented, nor proclamations made, he is not at any mischief, though he be of full age; per Cur. Le. 100. pl. 128. Pasch. 30 Eliz. B. R. in *Case of Rumney v. Eves*. S. P. 3 Le. 221. pl. 294. Pasch. 30 Eliz. B. R. *Anderfon v. Hayward*. S. C. in totidem verbis. —

4 Le. 30. pl. 84. S. C. in totidem verbis. — Gilb. Treat. of Ten. 216. cites S. C.

* This is altered by Statute 9 Geo. 1. Cap. 29. which see.

5. If a man be so weak and feeble that he cannot travel without danger, or if he hath a great office &c. these are good causes of S. P. cited by Popham Cro. E. 506.

in pl. 30. of excuse. Arg. Le. 104. pl. 139. Mich. 30 Eliz. B. R. in
to have been agreed 23
agreed 23
Eliz. in Sir
Sir John Braunch's Cafe.

Christopher Hatton's Cafe against the tenants of Willingborough.——Gawdy J. said, if the
copyholder be impotent the lord may set a fine upon him, and if he will *not pay the fine* it is
reason that he should forfeit his land. Le. 104. pl. 139. Mich. 30 Eliz. B. R. in Sir John
Braunch's Cafe.

Supplement to Co. 6. An attorney appointed by the copyholder cannot do the ser-
vices for him, but he may *effoin* the copyholder. Le. 104. pl.
Comp. Cop. 139. Mich. 30 Eliz. B. R. Sir John Braunch's Cafe.
83. f. 18. ad
finem cites
S. C. & S. P. accordingly.

Supplement to Co. 7. The summons of a copyholder to appear at the lord's court was
made at the church; the copyholder did not appear; all the
Court held, that this was not any cause of forfeiture, because
Comp. Cop. 75. f. 10. it was *not specially shewed to be the custom* to make such sum-
mons, and it would be hard to make it a forfeiture; for per-
haps he had no notice of it, therefore it *ought to be personal*
cites S. C.——Le. 104. pl. notice, for his refusal must be wilful to make a forfeiture, and
139. Mich. 30 Eliz. cited the Cafe of Lord Dacres v. Harleston to the purpose.
B. R. Sir Godb. 142. pl. 176. Hill. 36 Eliz. C. B. Anon.
John Braunch's Cafe, the whole court
held, that *general warning within the parish* is sufficient; for if the tenant himself be not resistant
upon his copyhold, but elsewhere, his farmer may send him notice.——Cro. E. 505, 506. in
pl. 30. Popham cited 23 Eliz. S. P. agreed by all the justices in Sir Christopher Hatton's Cafe,
against his tenants of Willingborough, and the same was agreed by the court Mich. 38 & 39 Eliz.
in the principal cafe.

[130]

Cro. E. 879. 8. Surrender to A. for life, remainder to B. in fee. A.
pl. 10. Paich. comes not in on 3 proclamations according to the custom, this is
44 Eliz. a forfeiture during the life of A. but on his death B. may
B. R. the enter. Noy 42. Baspool v. Long.
S. C. ad-
judged ac-
cordingly.——Yelv. 1. S. C. the estate of A. and B. are divided estates, and the custom shall
be intended of an intire fee-simple given to the same person; and the custom being to bar an
estate shall be taken strictly. Quære, if such surrender is made to A. and B. and their heirs, and
A. comes in within the time of the proclamations, but B. does not, whether if now A. shall have
the whole, or that the moiety shall be forfeited?

9. If he be hindered by sickness, or by overflowing of waters,
or if he be much in debt, and fear to be arrested, or if he be a
bankrupt and keeps his house; then his default is no forfeiture.
Co. Comp. Cop. 63. f. 57.

Cro. J. 226, 227. pl. 1. 10. Forfeiture was by an heir beyond sea not coming in at the
Underhill v. third proclamation; after 20 years the heir returned, prayed
Kelley, S. C. admittance, and proffered his fine, but the lord refused. Ad-
and held by 4 justices, judged that it was no forfeiture, the heir being beyond sea at
that it was the time of the proclamation made, and because the lord was
no for- at no prejudice since he received the profits of the lands in
feiture, but the mean time. Godb. 268. pl. 371. Mich. 7 Jac. C. B.
Crooke J. Anon.
e contra;
Williams

J. said, that the lord is at no mischief, but may seize in the interim, and take the mesne profits,
without being responsible for them.——8 Rep. 99. Lechford's Cafe, S. C. adjudged.——
S. P. by 3 justices; but it was agreed by the counsel of the defendant, that if he had gone over
ice

sea after the descent to him he had been bound. Cro. J. 101. pl. 32. Mich. 3 Jac. B. R. Whitton v. Williams. — Gilb. Treat. of Ten. 216, 217. cites S. C. says, that if such heir be within England at the time of the first proclamation passed, and then go beyond sea, he shall forfeit, for he had warning, and ought to have come in, and not have disabled himself from making claim; but if he had gone beyond sea after the descent, and before the first proclamation, this had been no forfeiture, for at the time of the court he is to make claim; sed quære; and Gilbert likewise makes a quære to the lord's being answered for the profits. Ibid.

11. The custom of a manor was, that those who claimed copyholds by descent ought to come at the 1st, 2d, or 3d court, upon proclamations made, to take up their estates, or else they should be forfeited. A tenant of the manor having issue inheritable by the custom, beyond the sea, died; the proclamations all passed, and the heir did not return in two years, but upon his return, he prayed to be admitted to the copyhold, and proffered the lord his fine in court, which the lord refused to accept of, and to admit the heir, but seized the land as forfeited. It was adjudged in this case, that it was no cause of forfeiture, because the heir was beyond the seas at the time of the proclamations, and the lord was at no prejudice, for that, for any thing appeared in the case, the lord had taken all the profits of the land in the mean time. Supplement to Co. Comp. Cop. 84. f. 19. Hill. 7 Jac. C. B. Copley's Case. 8 Rep. 99. a. Sir Richard Lechford's Case, S. C.

12. Where a copyholder in fee withdraws his suit to the lord's court, and does not attend for 3 years, if he was never summoned to attend, this is only a negligence, and no forfeiture; but if he had been warned to attend, and afterwards had refused, it had been a forfeiture; agreed per tot. Cur. Roll. Rep. 256. pl. 24. Mich. 13 Jac. B. R. Southcote v. Adams. 3 Bulst. 80. Belfield v. Adams, S. C. & S. P. agreed. But refusing or denying to do his suit is a for-

feiture. — Supplement to Co. Comp. Cop. 75. f. 10. cites S. C.

13. A copyholder was summoned to appear at court, and to do and perform his suit and services as a copyhold tenant &c. He made default. The declaration was, that *scilicet* voluntarie & contentuose subtraxit, & illam facere recusavit, and that on such a day notice was given to him by the bailiff of the manor to appear, but did not say by the command of the lord. The court held clearly, that here is sufficient matter of forfeiture of his copyhold, and that the declaration is good, and judgment accordingly. 3 Bulst. 268. Mich. 14 Jac. Hammond v. Winnibank. Roll. Rep. 429. pl. 21. Buttevant v. Pickstaff. S. C. and [131] though it was objected, that the court was not alleged to be held in the usual place, and if so,

that then peradventure the tenant was not bound to come to it, and that the manor may contain several houses, and so the place uncertain, yet judgment was given for the plaintiff. — Supplement to Co. Comp. Cop. 75. f. 10. cites S. C. as adjudged.

14. If the heir of a copyholder does not come in to be admitted upon proclamations, the lord may seize the land quousque the tenant comes in to be admitted, without any custom so to do, but to seize it as forfeited he cannot without a custom; Resolved. Lev. 63. Pach. 14 Car. 2. B. R. Earl of Salisbury's Case. Keb. 287. pl. 98. S. C. alias, Paterson v. Danges, the lord may seize without custom or personal notice.

and the court agreed, the case of Coek v. Lxx, that one saying he would come in if the lord had a court, otherwise not, that this is no forfeiture; but yet the lord on such refusal might seize quousque.

The proclamation was, that J. S. come in and be admitted to the lands descended to him. In ejectment the certainty of the lands were before

declared, and therefore Windham J. held it sufficient, unless the custom be contrary, and not like a demand of rent, which being generally of so much, as is in arrear, is ill; quod fuit concessum per Cur. the custom of the court being to demand is generally and not to specify the lands. Keb. 287. pl. 98. Pasch. 14 Car. 2. B. R. Patefon v. Danges, alias, Lord Salisbury's Case.

15. A question was, *Whether in the proclamation for the heir to come in and be admitted there ought to be a particular mention of the lands by name, as they are named in the copy, or whether a general proclamation to come in and be admitted to all the lands of his ancestor be sufficient?* This was intended to be found specially, but afterwards the parties agreed in court. Lev. 63. Pasch, 14 Car. 2. B. R. Earl of Salisbury's Case.

16. *Proclamations* whereby the lord claims forfeiture of a copyhold *ought to be proved viva voce*, and not by the court rolls only; held in evidence to a jury. Keb. 287. pl. 98. Pasch. 14 Car. 2. B. R. Patefon v. Danges, alias, Lord Salisbury's Case.

17. *The lord upon seisure of a copyhold may maintain ejectment till the heir comes in to be admitted;* Agreed per Cur. Keb. 287. pl. 98. Pasch. 14 Car. 2. B. R. Patefon v. Danges, alias, Lord Salisbury's Case.

Gilb. Treat. of Ten. 306. cites S. C. and says it is good, if he avers there are copyholders sufficient

to keep court that live near the manor, or else surely the custom will be void; for then no court can be held. As this case is reported by Siderfin, it is said it was held a good custom, because the court was a court baron, where the suitors are judges, but it seems to me to be all one; for that if it were a customary court, if sufficient copyholders were near the manor, it is unreasonable to oblige persons that live a great way off to attend; and if the court be a court baron, if there be not a sufficient number of tenants that live near the manor, to do the duty, then copyholders are obliged to do it in that court as well as freeholders, and therefore it seems the custom cannot be good, for no court can be held.

18. It is a good custom that a copyholder shall be discharged of suit to court baron, upon payment of 8d. to the steward for the lord, and 1d. to the steward for entering it. Sid. 361. pl. 5. Pasch. 20 Car. 2. B. R. Portbury v. Legingham. But See Tit. Suit of Court (D) S. C. pl. 4. and the Notes there.

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19. There hath been generally practised in most copyhold manors, that upon the mortgage of a copyhold the mortgagor surrenders into the hands of two customary tenants to the use of the mortgagee, upon condition to be void if the money be paid at such a day; now to avoid the fine to the lord the usual way is, *not to present the surrender at the next court; after the court is over to make a new surrender* into the hands of two customary tenants, ut supra and so from time to time, as often as any court shall be holden, which non-presentment is at law a forfeiture, and to be relieved against this forfeiture was a bill exhibited, which North Lord Keeper denied to help, but left them to common law. Skin. 142. pl. 13. Mich. 35 Car. 2. in Chancery. Anon.

20. 9 Geo. 1 cap. 29. s. 5. *No infant or feme covert shall forfeit any copyhold for neglect, or refusal to come to any court, and be admitted; or for the omission or refusal to pay any fine imposed on their admittance.*

[O. c]

[O. c] Forfeiture.
What will be a Forfeiture.
Nonfeasance.
 [Refusal of Services.]

[1.] If a jury or *homage* of the manor, after a note made to present the articles of the court, *refuse to make a pre-sentment* according to their oath, if they are copyholders, this is a forfeiture of their estates. * D. 4 Eliz. 211. 31.]

This in Roll is (C) pl. 1. in fol. 506. — Pasch. 4 Eliz. Anon. held

by 3 justices. — Supplement to Co. Comp. Cop. 75. f. 10. cites S. C. and says, that it was so resolved by both the chief justices in the Star-Chamber in the Earl of Arundel's Case. — S. P. by Gawdy J. Mo. 350. in pl. 468. — Gilb. Treat. of Ten. 217. S. P. — Co. Comp. Cop. 63. f. 57. S. P. and that it is a forfeiture *ipso facto*. — If a copyholder being with the other copyholders charged upon oath to enquire of the articles of the court baron, and sufficient matter being given to them in evidence to induce them to find a matter *within their charge*, and they or any of them obstinately refused to find the same, it is a forfeiture of their copyhold, 3 Lc. 109. pl. 158. Trin. 26 Eliz. B. R. said to have been adjudged, in case of Southton v. Thurston.

[2. If the copyholder does not pay the services due to the lord, this is a forfeiture. 42 E. 3. 25. 6. admitted.]

This in Roll is (C.2) pl. 6. in fol. 506. — Br.

tenant by copy &c. pl. 1. cites S. C. and the lord may seize the land; admitted for clear law. — 4 Rep. 21. b. S. C. cited per Cur. and that the lord shall have the corn then growing.

3. If upon a demand of services the tenant says, *these services which you require are doubtful whether you ought to have them or no, and until it be resolved by the law whether they are due I will not pay them.* Arg. Lat. 14. says it was adjudged to be no forfeiture. Pasch. 26 Eliz. between Barnham and Higgens.]

S. C. cited Arg. as Pasch. 16 Eliz. by the name of Vernon v. Huggins. Lat. 133.

and Crew Ch. J. said. It is a question, if copyholder denies to do services which are dubious, whether this be a forfeiture? — Gilb. Treat. of Ten. 216. S. P. — Calth. Reading. 67. S. P.

4. Refusal to be upon the *homage* is a forfeiture; per Gawdy J. Mo. 350. pl. 468. Trin. 35 Eliz. in Case of Crisp v. Fryer.

Co. Comp. Cop. 63. l. 37. S. P. and this is a forfeiture *ipso facto*.

5. If the lord demands *suit to his mill*, and tenant refuses, it is a forfeiture. D. 211. Marg. pl. 31. cites Trin. 1 Car. B. R. Rot. 633. Gray v. Ulysses.

Lat. 123. S. P. by Doderidge J. in S. C. [133]

6. If a copyholder be demanded to do his services, and he agrees to do them, but did not do them for a long time, this is a forfeiture; per Dampport and Crew. Lat. 122. Trin. 1 Car. in Case of Grey v. Ulysses, and cited 43 E. 3. 5.

7. If a copyholder does not come to do his services, yet if he be often demanded to do them, and still deserts, and puts off the time of doing them, though he does not absolutely refuse, yet it seems this makes a forfeiture. Lat. 14. Pasch. 2 Car. Johnson's Case.

Gillb. Treat.
of Ten. 216.
cites S. C.
according to
Roll Ch. J.

8. In trespass &c. The case was, that the defendant being lord of a manor, and holding court, and the plaintiff being a copyholder, and present in court, *and there being a question, whether the court was legally then held, or not, and he being asked if he did appear or not, answered, that if it was a legal court he did appear, but if it was not a lawful court, then he did not appear*; adjudged that this was no contempt, or non-appearance, so as to make a forfeiture. Roll. Ch. J. thought if there was no real controversy as to the legality of the court, but that the words were used only as a shift to avoid the plaintiff's doing suit and service, it is a forfeiture; but otherwise, if there was a real controversy. And the other 3 Justices inclined that it was no forfeiture. Et adjournatur, Sty. 241. Hill. 1650. Parker v. Cook.

[P. c] Forfeiture. Refusing to pay a Fine.

This in Roll
is (D) pl. 2.
in fol. 507.
—* Hob.
135. pl. 18a.
Hill. 13 Jac.
C. B. the
S. C. —

[1. IF a copyholder *refuses to pay his fine for admittance* after it is due, this is a forfeiture. Tr. 4 Jac. B. R. between *Fishe and Rogers*, agreed. * Hobart's Reports 183. between *Denny and Leman*. *If there be a demand thereof from the person of the tenant, otherwise not.*]

Supplement to Co. Comp. Cop. 75. f. 10. cites S. C. — See (C. a) pl. 3. and the notes there.

It was said, that if a copyholder refuse to pay a reasonable fine, or to be admitted to the copyhold, this is a forfeiture of his estate. Sty. 387. Mich. 1653. B. R. *Fanshaw v. Bond*. — If the lord upon the admittance of a copyholder, the fine by the custom of the manor being certain, demands his fine, and the copyholder denies to pay it upon demand, *this is a forfeiture ipso facto*. Co. Comp. Cop. 64. f. 57. cites 4 Rep. 27. b. Hobart v. Hammond.

This in Roll
is (D) pl. 3.
—* Cro. E.
353. pl. 10.
S. C. but
S. P. does
not appear
—4 Rep.
27. a. b. pl.
15. S. C.
but S. P.
does not ap-

[2. If the lord *assesses an unreasonable fine* upon his tenant, and the copyholder *refuses to pay* it, this is a forfeiture. P. 36 Eliz. B. between * *Taverner and the Lord Crumwell* adjudged, cited Pasch. 38 Eliz. B. R. in *Crisp's Case*; it seems this is not law; et vide this Case, Coke's Entries 288. where no such matters appears to have been in the case. Contra 1 Jac. B. Rot. 185. between † *Stallon and Brady*, adjudged (as it seems) cited Co. Lit. 60.]

pear. — 3 Le. 107. pl. 158. S. C. but S. P. does not appear. — 4 Rep. 27. b. 28. a. pl. 16. Mich. 42 & 43 Eliz. B. R. *Hubard v. Hammond* S. P. resolved contra, viz. that he may deny to pay it without forfeiture and it shall be determined by the opinion of the justices before whom the matter depends, or upon demurrer, or upon evidence to a jury upon the confession or proof of the annual value of the land, whether the fine demanded was reasonable or not. — Cro. E. 779. pl. 13. *Dalton v. Hammond* S. P. accordingly, held per Cur. and seems to be S. C. — Supplement to Co. Comp. Cop. 74, 75. f. 10. S. P. — Co. Comp. Cop. 64. f. 57. S. P.

† 13 Rep. 1. Mich. 6 Jac. C. B. *Willowes's Case*, seems to be S. C. & S. P. admitted.

[134]
This in Roll
is (D) pl. 4.
— See pl. a.
and the
notes there.

[3. But if *after the fine imposed, the tenant intreats the lord to mitigate the fine, and after he refuses it, the refusal of the tenant after to pay this unreasonable fine* is a forfeiture. Pasch. 36 El. B. in *Taverner and the Lord Crumwell's Case* agreed; it seems this is not law. Et vide this Case, Coke's Entries 288. where no such question appears in the Case.]

[4. If

[4. If the lord *assesses a fine where the fine is not certain*, and the tenant *refuses to pay it*, though this be *after adjudged to be a reasonable fine*, yet this is not any forfeiture, because it was dubious to the tenant, and matter of controversy between lord and tenant, whether it was reasonable.]

This in Roll is (D) pl. 5. in fol. 507. — The court seem- ed, that a copyhol- der's refus-

ing to pay a fine in a dubious matter, is not such an obstinate and wilful refusal as will incur a forfeiture. 3 Lev. 309. Trin. 3 W. & M. in C. B. Barnes v. Corke. — But where the fine is certain he ought to tender it, but contra where it is uncertain; for the lord ought to assess the fine and admit him, and give him a convenient time to pay it. — Cro. E. 779. pl. 13. Mich. 42 & 43 Eliz. B. R. Dalton v. Hammond and if he pays it not, then the lord to enter.

5. Where a fine is *denied after admittance* it is a forfeiture of the copyhold, cited by Popham Ch. J. 4 Rep. 28. a. in pl. 16. Mich. 42 & 43 Eliz. as adjudged in Sands's Case, and that it was so resolved by Wray and Periam, justices of assize in evidence to the jury in Case of Bacon v. Flatman.

6. If the lord *demand*s an *excessive fine*, and the copyholder *refuses to pay it*, this is no forfeiture, but otherwise where a rea- sonable fine is demanded. Mo. 622. pl. 851. Mich. 42 & 43 Eliz. Dalton v. Hammond.

Cro. E. 779. pl. 13. S. C. & S. P. — 4 Rep. 27. b. pl. 16. Hub-

bard v. Hammond S. C. & S. P. — Supplement to Co. Comp. Cop. 75. f. 10. S. C. & S. P. — Gilb. Treat. of Ten. 205. cites S. C. and 13 Rep. 3. [Willows's Calc.]

7. If the *fine* by the custom of the manor be *uncertain*, though a reasonable fine be assessed, yet because no man can provide for an uncertainty, the copyholder is not bound to pay it presently upon demand, but shall have convenient time to discharge it, *if the lord limit no certain day for payment there- of; and if within convenient time it be not discharged*, this is a forfeiture without presentment. Co. Comp. Cop. 64. f. 57.

8. Though a *fine assessed* be reasonable, yet the lord *ought to appoint a certain day and place* on which it should be paid, be- cause it stands upon a point of forfeiture of the estate, and the copyholder is not tied to carry his fine always with him; per Cur. 13 Rep. 2. Mich. 6 Jac. Willows v. Willows.

Supplement to Co. Comp. Cop. 75. f. 10 cites S. C. — Gilb. Treat. of Ten. 205.

cites S. C. but a fine certain he must pay presently upon admittance.

9. The lord may *distrain* the copyholder *for the services* or *seise the land*. Noy. 135. Mich. 7 Jac. Rivet v. Doe.

a Brownl. 279. Rivet v. Downs S. C. & S. P. admitted.

10. Upon demurrer it was adjudged, that the lord was *not bound to aver, or shew that the fine assessed was reasonable*, for that must come on the copyholder's side to shew the circum- stances of the case, to make it appear that it was unreason- able, and so to put it upon the judgment of the court. Hob. 135. pl. 182. Hill. 13 Jac. C. B. Denny v. Leman.

11. The lord *assessed a fine of 12l. and appointed it to be paid at his manor-house 3 months afterwards*, but the copyholder *pre- tending that the fine was certain, viz. 2 years quit-rent, offered to pay accordingly on the day when the other fine was assessed, but on the day appointed by the lord for payment he came not to the place*

Gilb. Treat. of Ten. 313. cites S. C. [135]

place to excuse his non-payment, nor made any other refusal; the Court held that this was a forfeiture, but if he had come at the day and place assigned, and tendered the 2 years quit-rent, being the fine certain due, according to the custom, though not the fine assessed and demanded by the lord, it had been no forfeiture. Cro. J. 617. pl. 1. Mich. 19 Jac. B. R. Gardiner v. Norman.

Sid. 58. pl. 56. S. C. but not upon the S. P. — Gilb. Treat. of Ten. 275. cites S. C. and says it seems to him that if upon demand the heir refuses to pay the fine it is a forfeiture.

12. H. was a copyholder of the manor of L. and upon his admittance the lord in open court assessed 2 years purchase for a fine, and appointed him to pay it within half a year. H. replied, *he would pay 3 years quit-rent for the fine, according to the custom, and that the tenants are not to pay an uncertain fine.* Afterwards the lord entered for a forfeiture, for not paying the fine he had assessed, and brought ejectment. It seemed to the court, that if there was a *real doubt*, whether the fine was certain or not, the denying to pay an uncertain fine is no forfeiture, though found afterwards that the fine ought to be certain; but that such doubt ought to be real, and *not covenous*, Raym. 41. Mich. 13 Car. 2. Br. Wheeler v. Honour.

13. The defendant was admitted tenant to a copyhold, and a fine of 8l. set upon him, payable at three several payments, a third part of which being personally demanded, and he refusing to pay it, the lord brought an ejectment to recover the lands as forfeited; the reason why he refused to pay it was, because upon a survey of the manor, in the reign of Queen Elizabeth, by virtue of a commission directed to some men of credit, and by the consent of the lord of the manor, and his tenants, a decree was then made by the Court of Chancery, by which the fine was ascertained, according to the value of the lands at that time, and which was a year and half's value upon descents, and 2 years on an alienation, and this was to be binding for ever. The question was, *How the years value should now be computed*, whether as at that time, or according to the improved value, and the tenant refusing to pay according to the improved value, but being willing to pay as it was set in the reign of Queen Elizabeth, upon the survey of the commissioners, this ejectment was brought. Lord Ch. Baron held, that if it be a doubt, and the tenant gives a probable reason, to make it appear that no more is due than what he is ready to pay, it is no forfeiture, and the doubt being whether it shall be paid according to the computed or improved value, he inclined that the action would not lie. The Court were doubtful in the matter, and upon the whole thought it a proper case for equity, and so directed a juror to be withdrawn, which was done. 2 Mod. 229. Pasch. 29 Car. 2. in Scacc. Trotter v. Blake.

[Q. c] Forfeiture. Nonpayment of Rent.

[1. IF a copyholder be to pay a certain *rent* yearly by his copy to his lord, and the lord comes upon the land, and demands his rent at the day, and the *copyholder being present refuses to pay* it, this is a forfeiture. Pasch. 2 Jac. B.]

This in Roll is letter (C) pl. 2. in fol. 506. — Co. Comp. Cop.

64. l. 57. S. P. that it is a forfeiture ipso facto.

[2. If a copyholder be *absent when the lord demands the rent at the day*, and nobody is there to pay it, which is a refusal in law, yet this is not any forfeiture, for this does not amount to a voluntary refusal. Dubitatur, P. 38 Eliz. B. R. between *Crisp and Frier, P. 2 Jac. B. † Robert's Reports 183. And Denny and Lemon, there ought to be a demand from the person of the copyholder to make a forfeiture.]

This in Roll is (C) pl. 3. — Cro. E. 505. pl. 30. S. C. Popham v. Gawdy held this a forfeiture, but Fenner c

contra. Adjournatur. — Mo. 350. pl. 468. S. C. and Popham and Gawdy held, that this voluntary negligence for so long a time [viz. for a years before, as Cro. E. states it] implies a wilful refusal, and is a forfeiture. — Noy 58. S. C. held accordingly by Popham and Gawdy, but Fenner c contra. — Supplement to Co. Comp. Cop. 74. l. 10. cites S. C. and says, that the better opinion of the court seemed to be, that it was a forfeiture; but says quare of it; for it was resolved in another case, Trin. 21 Jac. C. B. that non-payment of rent, or of the fine upon admittance to his copyhold was no forfeiture of his copyhold estate, unless there was some express verbal denial of it, which there was not in this case. — S. C. cited Gilb. Treat. of Ten. 211, 212.

† Hob. 135. pl. 18a. S. C. held accordingly, both for rent and fine. — Supplement to Co. Comp. Cop. 75. l. 10. cites S. C.

[3. If a copyholder be present at the time of the demand of the rent, and *saith that he hath not his rent ready*, this is no forfeiture, for the lord may distrain. P. 2 Jac. B.]

Lat. 122. Trin. 1 Car. in case of Gray v. Ullises S. P.

ruled accordingly. But because the lord upon such excuse ordered him to pay it at his house such a day (which house was within the manor) the non-payment then will amount to a wilful refusal and a forfeiture; but if the place which the lord had assigned had been out of the manor, failure of payment there would be no forfeiture. — S. C. cited Gilb. Treat. of Ten. 213, 214.

4. If the rent be demanded of the tenant himself, and he says nothing; per Popham and Gawdy J. this *silence and non-payment* is a forfeiture. Noy. 58. cites 42 E. 3. 5. in Case of Crispe v. Fryer.

5. Popham Ch. J. held that non-payment of rent, if the demand was after the day of payment, was no forfeiture; but per Fenner J. many defaults of payment may be deemed a forfeiture. Goldsb. 143. pl. 59. Hill. 43 Eliz. Anon.

6. If rent be demanded of a copyholder, who replies he had no money, this is not a forfeiture, for the denial ought to be a wilful denial. Godb. 142, 143. pl. 176. Hill. 36 Eliz. C. B. cited per Cur. to have been adjudged in one Winter's Case.

If the copyholder says that he wants money to discharge

the rent, and therefore intreats the lord to forbear until he be better provided, unless the lord gives his consent, this non-payment is a forfeiture ipso facto; for a copyholder knowing his day of payment is to provide against the day; but if the lord comes upon the copyholder's ground, and demands his rent, and neither the copyholder himself, nor any other by his appointment, is there present

present to answer the demand, though this be a denial in law of the rent, yet this is no forfeiture. Co. Comp. Cop. 64. f. 57. — But if the lord continues in making demand upon the ground, and the copyholder is still absent, this continual denial in law amounts to a denial in fact, and makes the copyholder's estate subject to a forfeiture without presentment. Co. Comp. Cop. 64. f. 57.

[137] 7. If a copyholder will *swear in court that he is none of the lord's copyholder*, this is a forfeiture ipso facto. Co. Comp. Cop. 63. f. 57.

Refcous and Replevin are forfeitures of copyhold land because they amount to wilful refusals. Gilb. Treat. of Ten. 228.

8. If a copyholder will sue a replevin against the lord upon the lord's lawful distress for his rent or services, this is a forfeiture ipso facto. Co. Comp. Cop. 64. f. 57.

Gilb. Treat. of Ten. 214. cites S. C. — So if a bargain and sale be of a manor by deed indentured and enrolled, the bargainee shall not take advantage of a forfeiture without notice, cited as adjudged and affirmed per Cur. for good law. 8 Rep. 92. b. — It seems the law is the same concerning lease and release, but if the manor be in possession of the lord himself, and not in the hands of any lessee, and he makes a lease, and then releases, the lessee having possession, quære if the copyholder denies paying, if this is not a forfeiture, because the entry of the lessee is notice as much as livery &c. Gilb. Treat. of Ten. 214.

9. Where the *estate of a lord of a manor ceases by limitation of an use*, and the use and estate thereof is transferred to another, who demands rent of a copyholder, and he refuses to pay it, it is no forfeiture of the copyhold, without notice given to the copyholder of the alteration of the use and estate. 8 Rep. 92. a. cited per Cur. as adjudged Hill. 1 Jac. Beconshaw v. Southcot.

Gilb. Treat. of Ten. 114. cites S. C. as adjudged no forfeiture.

10. A feme widow copyholder knew not how to pay her rent, and several came for the rent, but she put them all off with dilatory answers. At last came a young gallant and demanded it; she answered, that she did not know him, but if he would dance before her, if she liked his dancing, she would pay it. Cited by Harvey J. as a case which he knew in question; and Fenner J. doubted if this denial was a forfeiture, but adjudged that it was not, because it was not a wilful denial. Litt. Rep. 267, 268. Pasch. 5 Car. C. B.

(R. c) Forfeiture. By what Persons. Infant, Non compos &c.

1. A Man *non sanæ memoriæ*, an ideot, or a lunatick, though they be able to take a copyhold, yet they are unable to forfeit a copyhold, because they want common reason, nay common sense. Co. Comp. Cop. 65. f. 59.

But an infant at the age of discretion may forfeit his copyhold, not by offences which proceed from negligence or ignorance, but by such as proceed from contempt. Co. Comp. Cop. 65. f. 59.

2. So an infant that is under the age of 14 is unable to forfeit his copyhold, because he wanteth discretion, and till then he is to be in ward to the next of kindred, to whom the inheritance cannot descend, or to the lord, or the bailiff of the manor, as the custom shall warrant. Co. Comp. Cop. 65. f. 59.

3. A *feme covert* by an act she can do of herself, cannot possibly forfeit her copyhold; because she is not *sui juris*, sed *sub potestate viri*; but if she do any act which amounts to a forfeiture by the consent of her husband, this is in her a forfeiture. Co. Comp. Cop. 65. f. 59.

4. If *cestuy que use* of a copyhold commits waste, he shall not forfeit his copyhold. Co. Comp. Cop. 65. f. 59.

5. In an *infant comes not in to be admitted*, according to the custom, at three solemn proclamations made at three several courts, or if he will suffer his houses to go to ruin, or his ground to be surrounded, these acts, favouring of *negligence* only, are no forfeitures. Co. Comp. Cop. 65. f. 59. [138]

6. So if an *infant* copyholder *sues a replevin* against the lord upon distress lawfully taken, or if he aliens by deed, or the like, these acts relishing of ignorance only, are no forfeitures. Co. Comp. Cop. 65. f. 59.

7. But if he *denies from time to time to pay the lord the rent*, or *commits voluntary waste*, notwithstanding often *warning given him* by the lord, these acts proceeding from malice and contempt are forfeitures; and so if he commits felony or treason. Co. Comp. Cop. 65. f. 59.

8. In ejectment it was found by a special verdict, that the custom of a manor was, That if on a surrender presented, and three proclamations, the surrenderee comes not to be admitted, the lord shall seise as forfeited. Surrenderee died; three proclamations were made; his heir, an infant, did not come in; the lord seised. Holt Ch. J. held the infant was bound; because otherwise the lord would lose his fine; and it is not the forfeiture of the infant, but of the surrenderor in whom the estate continues till admittance; and that if it be a forfeiture it is so only quousque. But Dolben, Eyre, and Gregory contra. Custom shall not be intended to reach infants; and by Eyre, if it had been found expressly, that all persons, infants, as well as others &c. he had been bound; for as custom makes his inheritance, it may abridge it, and the lord cannot be said to lose a fine, for he has a tenement and no fine due, nor occasion of admittance, and here is no room to suppose a temporary forfeiture, for the jury have found the custom to be of an absolute forfeiture, nor is the infant within the custom, for as found, it is, that if the person to whom the surrender is made comes not, the bailiff of the manor may, by command of the lord, seise such tenement as forfeited. In error on a judgment in C. B. which was affirmed. 1 Salk. 386. pl. 1. Hill. 1 W. & M. King v. Dillifon.

Comb. 118.
King v.
Dillifon,
S. C. but
the court
being divid-
ed it was
adjourned.
—Carth.
41. S. C.
and judg-
ment in
C. B. affirm-
ed in B. R.
by 3 jus-
tices, contra
Holt Ch. J.
—Lutw.
765, 769.
S. C. in C. B.
and judg-
ment was
there given
by opinion
of the whole
court for the defend-
ant. —
1 Show. 31.
S. C. argu-
ed, and
Ibid. 83.

S. C. argued by the judges, and judgment affirmed, by the opinion of three judges, contra Holt Ch. J. — 3 Mod. 221. S. C. with the arguments of the judges, and judgment affirmed by three justices, contra Holt Ch. J.

(R. c. 2). Forfeiture. By whom. One not in Possession.

Supplement to Co. Comp. Cop. 75. f. 10. cites S. C. — Gilb. Treat. of Ten. 227. cites S. C. and says, though the custom was if a copyholder be convicted of felony, yet it seems conviction is not necessary; but if the thing will bear it, it is good to lay a custom.

1. **CUSTOM** of a manor, that if a copyholder be *convicted of felony it is a forfeiture*, and that the widow has frank-bank, and that the heir shall not be admitted to the copyhold during the life of his mother. The *widow having her frank-bank, the heir commits felony*, which is presented by the homage, and dies, *leaving a son*, the estate is forfeited (notwithstanding the frank-bank) as to the heir of the felon. Le. 1. pl. 1. Hill. 25 Eliz. C. B. Bornford v. Packington.

[139] 2. If a *copyhold be surrendered to the use of J. S. and before admittance J. S. commits waste*, this is no forfeiture; for by the same reason that he cannot grant before admittance, he cannot forfeit before admittance. Co. Comp. Cop. 65. f. 59.

3. If a *disseisor of a copyhold commits waste* this is no forfeiture. Co. Comp. Cop. 65. f. 59.

4. If two *jointenants be of a copyhold, and one commits waste*, he forfeits his part only; for no man can forfeit more than he hath granted. Co. Comp. Cop. 65. f. 59.

5. If there be *tenant for life with remainder over of a copyhold, and the copyholder for life purchases the manor, commits waste, or does any act which amounts to the extinguishment, or the forfeiture of a copy, yet the remainder is not hereby touched*. Co. Comp. Cop. 65. f. 59.

6. If a *copyhold be granted to three habend. successive*, where by the custom of the manor this word successive takes place, *the first copyholder cannot prejudice the other two by any act he can do, no more than if a copyholder in fee by licence makes a lease for years by deed, or without licence by copy, and either of these lessees commits waste, the reversion is not hereby forfeited*. Co. Comp. Cop. 65. f. 59.

[S. c] Forfeiture.

This in Roll is letter (F) in fol. 509.

In what Cases the *Forfeiture of one shall be of another*.

S. P. resolved, unless there is an express custom. 9

[1.] If there be *tenant for life, the remainder in fee, of a copyhold, and the tenant for life commits a forfeiture, this shall not bind the remainder.*]

Rep. 107. a. Pasch. 10 Jac. in Podger's Case. — No forfeiture of a tenant for life shall by law prejudice him in remainder or reversion, per Gawdy, J. only in court, the other justices being absent in parliament and conceiving the principal case to be clear, he commanded judgment to be entered accordingly. Cro. E. 598. pl. 3. Hill 40 Eliz. B. R. in case of Rastal v. Turner. — Cra. k. 880. in pl. 10. cites Trin. 39 Eliz. Redial v. Lacon S. P. accordingly, and seems to be S. C. — Noy 42. cites Rastal v. Lane S. P. and seems to be S. C.

[2. As

[2. *As if there be tenant for life, the remainder in fee, of a copyhold, and the tenant for life suffers the house to decay and be wasted, by which the estate of the tenant for life is forfeited, and the lord enters for the forfeiture, yet this shall not bind him in remainder, but only the tenant for life.* Tr. 39 El. B. R. between *Rastel and Turner*, adjudged, upon a special verdict.]

See pl. 1. and the notes thereto.

[3. *If a feme tenant for life of a copyhold takes husband, and the husband commits a forfeiture of the copyhold, and dies, this forfeiture shall bind the feme.* 4 Co. between *Clifton and Molineux* resolved.]

4 Rep. 27. s. pl. 14. Mich. 27 and 28 Eliz. B. R. the S. P. resolved.

—Gibb. Treat. of Ten. 203. cites S. C. —If the husband denies to pay the rent, or to do suit, and dies, the forfeiture remains; for the lord must have his services, and the feme has no way to avoid these non-feasances; per Wray. Cro. E. 149. pl. 18. Mich. 31 and 32 Eliz. B. R. in case of *Hedd v. Chaloner*.

[4. *If a copyholder leases for years, by licence of the lord, and after the lessee makes a feoffment this shall forfeit only his estate, and not the estate of the copyholder.* P. 1. Ja. B. between *White and Hunt*. Hobart's Reports 239.]

Gibb. Treat. of Ten. 232. cites S. C.

[5. *If a feme copyholder takes baron, and the baron makes a lease for years, though the lord enters for a forfeiture, yet this is not any forfeiture to the feme after the death of the baron, but she may well enter because this act was a tort to the feme as well as to the lord; and where there is a tort to the feme, it is not reasonable that it should be a forfeiture of her estate.* Mich. 21 Jac. B. R. between *Saben and* , adjudged upon a special verdict.]

[140] Cro. C. 7. pl. 4. *Saverne v. Smith Pasch.* 1 Car. in Cam. Scacc. adjudged that such forfeiture shall not

bind the feme; but upon another point *Caria* advise vult. —Palm. 383. S. C. *Lea Ch. J.* said it seemed to him that the court were all of one opinion that this forfeiture did not bind the feme or her heirs after the baron's death, and judgment nisi. —Roll. Rep. 344. S. C. adjournatur. —Ibid. 361. S. C. adjournatur. —Ibid. 372. S. C. says that *Doderidge J.* the term before took a difference where the lord entered in the life of the baron and where not, but now he said nothing, whereupon *Ley Ch. J.* thought the court of one opinion, and gave judgment nisi. &c. —*Doderidge J.* before held this to be a forfeiture, and took this difference, (viz.) *Where a feme sole is a copyholder and afterwards she marries, and her husband makes a lease for years without licence, this is a forfeiture, because it was her folly to marry a man who will forfeit her estate; but where a copyhold is granted to a feme covert, and her husband makes such a lease, it is no forfeiture.* Godb. 345. pl. 348. cites Trin. 21 Jac. *Severne v. Smith*. —Palm. 385. S. C. and same diversity taken by *Doderidge J.* —Gibb. Treat. of Ten. 228. cites S. C. but if she does anything that makes the lease to have continuance the forfeiture remains.

[6. *But if a baron seised of a copyhold in right of his feme, does waste, this forfeiture shall bind the feme after the death of the baron, because the act done is not any tort to the feme, but lawful as to her, and only a tort to the lord.* Co. 4. 27. [*Clifton and Molineux*.]

A woman copyholder married, and then her husband made a lease for years not

warranted by the custom of the manor; Wray said, that if the husband denies to pay the rent, or do suit in court, these are present forfeitures which shall bind the wife; for they are things which the lord must necessarily have, but a lease is no great prejudice to him, and it is good to advise; but *Shurley and Tanfield* said it had been adjudged that waste is a forfeiture, which shall bind her. Cro. E. 149. pl. 18. Mich. 31 and 32 Eliz. B. R. *Hedd v. Chaloner*. —Gibb. Treat. of Ten. 208. cites S. C. —But if a stranger had committed waste here with the assent of the husband, this would be no forfeiture. 4 Rep. 27. 2. pl. 14 in S. C. resolved. —Gibb. Treat. of Ten. 203. cites S. C. and S. P.

7. Where

Dal. 49. pl.
12. S. C. in
toudem ver-
bia. —
Supplement
to Co.
Comp. Cop.
76. f. 11.

7. Where copyholds are demisable for 2 lives successively as to *tenant for life, remainder for life*, if tenant for life cuts trees it is a forfeiture of both, and if a *stranger cuts trees*, or one that occupies by their sufferance, it is a forfeiture of the copyhold. Mo. 49. pl. 149. Pasch. 5 Eliz. Anon.

Cro. E. 879.
pl. 10. S. C.
— For
they are
divided

8. Surrender to A. for life, remainder to B. in fee. *A. comes not in on 3 proclamations* according to the custom, this is a forfeiture during the life of A. but on his death B. may enter. Noy 42. 43 Eliz. Baspool v. Long.

[141]

Cro. E.
880. cites
39. Eliz.
Redfall v.
Lacon S. P.
accordingly.

9. *Waste by lessee for life* is forfeiture only during his own life, and shall not prejudice the remainder in fee. Noy. 42, 43 Eliz. Baspool v. Long.

10. If *husband and wife* be joint copyholders of the purchase of the husband, and during the coverture, the husband is attainted of felony, and dieth, it is no forfeiture of any part of the copyhold; but if the purchase be made before the coverture, then it is a forfeiture of the moiety. Supplement to Co. Comp. Cop. 76. f. 10.

11. If a *guardian of a copyholder commits waste*, he shall forfeit the wardship only, not the inheritance of the copyhold. Co. Comp. Cop. 65. f. 59.

12. If *husband commits waste in copyhold lands which he has in right of his wife*, this is a forfeiture of the wife's copyhold. Co. Comp. Cop. 65. f. 59. cites 4 Rep. 27. a.

13. But if a *stranger commits waste, without the consent of the husband*, this is no forfeiture, though the wife consents. Co. Comp. Cop. 65. f. 59.

14. If 2 *joint-tenants* are of a copyhold and one commits waste, he forfeits his own part only; for no man can forfeit more than he has granted to him. Co. Comp. Cop. 65. f. 59.

15. *Cestuy que trust* of a copyhold estate commits treason or felony, this no way charges or affects the copyhold estate, but if a *trustee* does it is a forfeiture of the whole estate: but where a copyholder in fee on his marriage surrendered to the use of himself for life, remainder to the first &c. son in tail male,

male, remainder to himself in fee, and no admittance on such surrender is had in many years after, and in the mean time he does acts of forfeiture, and the lord is in for the forfeiture, and the tenant denied relief in equity, yet whether if the eldest son should bring a bill against father, and the lord to compel an admittance pursuant to the marriage surrender and settlement, was not in the case; but Lord Macclesfield said, that on such bill it might come then to be considered, how far the forfeiture of the father should bind the son. Ch. Prec. 573. Trin. 1721, in Case of Sir H. Peachy v. the Duke of Somerset.

[T. c] Advantage. *Who shall take Advantage of a Forfeiture, [as Lord.]* This in Roll is letter (G) in fol. 509.

[1. A Copyholder for life, where the remainder is over for life, commits a forfeiture, he as the remainder shall not enter, but the lord, because the remainder is to commence in possession after the death of the lessee by the custom.]

[2. Lessee for years of a manor shall take advantage of a forfeiture committed by a copyholder of the manor, for he is dominus pro tempore. M. 38, 39. El. B. R. in * East and Harding's Case, agreed per Curiam. Tr. 10 Ja. B. between Rawles and Mason, per Curiam. * S. P. held accordingly, per tot. Cur. Cro. E. 498. pl. 19.

[3. If there be a lord of a manor, in which there are copyholders, tenants of the manor, and the lord grants to a stranger the freehold of a copyhold in fee, though by this the tenement is divided from the * manor, and not demiseable by copy again, yet the grantee of the freehold shall take advantage of a forfeiture committed after by the copyholder, for he ought to pay his rent to the grantee.] S. P. agreed by all the justices. Cro. E. 490. pl. 19. Mich. [142] * Fol. 510.

38 & 39 Eliz. B. R. in case of East v. Harding. — Mo. 393. pl. 508. S. C. & S. P. agreed, with this difference, that all forfeitures which accrue by reason of matters of the court are discharged, but not forfeitures at common law, as waste, and leases to the disinherison, but that the feoffee shall enter and take advantage of such as are done in his time. — Gilb. Treat. of Ten. 229. cites S. C. — The feoffee or lessee shall have advantage of all forfeitures belonging to land, as in case of feoffment &c. but not for not doing of fealty; per Popham. Ow. 63. Palch. 39 Eliz. in case of East v. Harding.

[4. So in this case, if the grantee of the freehold makes a lease for years of the freehold, this lessee for years shall take advantage of a forfeiture committed after by the copyholder, because he is dominus pro tempore. Mich. 38, 39 Eliz. B. R. between East and Harding, adjudged by the opinion of all the judges.] Cro. E. 449. pl. 19. S. C. & S. P. Gawdy and Fenner doubted if lessee of the feoffee might enter;

but they agreed, that lessee for years of a manor might take advantage of the forfeiture of a copyhold; but Popham and Clench held clearly, that lessee for years of the feoffee might well take advantage of that forfeiture; for the copyholder, as to the forfeiture of his estate, remains in all degrees as before the severance thereof from the manor. — Mo. 393. pl. 508. S. C. & S. P. but the court was divided; but adds, that Mich. 40 & 41 Eliz. Popham put the point at Serjeant's Inn to all the justices of England, and that they inclined that the lessee for 10 years should take advantage of the forfeiture, whereupon rule was given for judgment, and was adjudged Hill. 48 Eliz. — Ow. 63. S. C. & S. P. but not very clear.

Cro. C. 333. pl. 15. S. C. adjudged a forfeiture, and that the lord's acceptance (he not knowing of the forfeiture) is no dispensation therewith, so that the lord's lessee has a good estate and right in him, for which his entry is lawful. —

5. If a copyholder for life makes a contract at one time, to make three several leases by indenture, one to commence after the other, there being two days between each, and after makes the three several leases accordingly, and seals them at one time, and the lessee enters, and after the copyholder surrenders to the lord to the use of the lord, who hath not any conscience of the making of these leases, and after the lord enters, and makes a lease for years to J. S. and the first lessee for years brings trespass against the second lessee, and adjudged it does not lie; because it was a forfeiture, and a void lease against the lord, so that by his entry he was in of his ancient right. Mich. 7 Car. B. R. between *Matthews and Wheaton* adjudged upon a special verdict, I myself being de consilio querentis. Intratur Hill. 5 Car. B. R. Rot. 496.]

Jo. 249. pl. 3. *Mathews v. Wheaton*, S. C. states it as one day between the several leases. Agreed per tot. Cur. that though the general custom of the realm allows a copyholder to make a lease for a year, yet this ought to be a lease in present, and he cannot make another for another year in reversion, and that when the surrender was made to the lord this lease was void against him, and his interest discharged, without presentment and seizure for the forfeiture.

6. The custom was, that if a copyholder makes a lease for more than one year, that he shall forfeit his copyhold. A copyholder committed such a forfeiture, and afterwards the lord leased the manor for years, and lessee entered for the forfeiture; but per Weston, it was held it was not lawful, for though the heir may enter in the time of his ancestor for a condition broken, because he is privy in blood, yet the lessee cannot so do, for he is a stranger; but per Dyer if the forfeiture is presented by the homage, and enrolled in the court-rolls, the lessee may afterwards enter, because by the forfeiture the copyhold estate was determined. 4 Le. 223. pl. 359. Mich. 9 Eliz. B. R. Anon.

Gilb. Treat. of Ten. 234. S. P. and cites S. C. [143] and says the reason of

7. Two coparceners copyholders, the one made a feoffment in fee. The lord made a lease of the manor. The lessee shall not take advantage of this forfeiture, because he is not privy in title; but if the lessor dies, the heir shall take advantage. Lat. 227. cites it as agreed in Harper's Rep. 18 Eliz.

the diversity seems to be, because waste is a prejudice to the lord only, for the time being at least, and is not so great a prejudice as feoffments, (and so it seems of other forfeitures a denial of rent, Suit of court &c. & a fortiori these forfeitures, for the denial doth no way prejudice the succeeding lord) but feoffment divests the lord of his freehold and inheritance, which being standing prejudices the lord, he ought to have remedies as lasting as the harm that is done to him. *Quere*, if the lessor outlives the lease, whether he may take advantage of the forfeiture. — Lat. 226. Trin. 22 Jac. *Cornwallis v. Horwood* S. P. dubitatur, and adjournatur. — Palm. 416. *Cornwallis v. Hammond*, S. C. dubitatur.

8. Lessee for years of a manor shall not take advantage of a forfeiture for not doing fealty; per Popham. Ow. 63. Mich. 39 & 40 Eliz. in Case of East and Harding.

for years; per Weston, lessee cannot enter for the forfeiture; per Dyer, if the forfeiture be presented by the homage, and enrolled in the court-rolls, lessee may afterwards enter, for by the forfeiture the copyhold is void and determined. 4 Le. 223. — He shall take advantage of the forfeiture without any presentment by the homage, per Warburton J. Arg. a Brownl. 197. Trin. 10 Jac.

20 Jac. C. B. in case of Rowles v. Masod.——The lord's lessee may enter for a forfeiture, per Cur. Cro. C. 233, 234. pl. 15. Mich. 7 Car. B. R. Matthews v. Whetton.

9. *Copyholder made a lease for years, without licence, which is a forfeiture of common law, and afterwards the lord of the manor made a feoffment or a lease of the freehold of this very copyhold to another; adjudged, that the feoffee or lessee should not take advantage of the forfeiture, because the lease made by the lord, before entry or presentment, is an assent that the lessee of the copyholder shall continue his estate, and so is in nature of an affirmance of the lease made.* Owen 63. Mich. 39 & 40 Eliz. Penn v. Merrivall.

S. C. cited by Levins J. a Vent. 39. Pasch. 35 Car. s. C. B. and said, that there is a difference between an heir taking advantage of a forfeiture in

the time of the ancestor, and an alienee in the time of the former lord.——Gilb. Treat. of Ten. 229. cites S. C.

10. If a *copyholder makes a feoffment, and then the lord aliens, neither the grantor nor the grantee can take benefit of this forfeiture, for neither a right of entry nor a right of action can ever be transferred from one to another.* Co. Comp. Cop. 66. f. 60.

11. If *tenant for life be of a manor, with remainder over in fee to a stranger, if a copyholder commits waste, and then tenant for life of the manor dies before entry, yet he in remainder may enter, for he had an interest in the manor at the time of the forfeiture committed, though he could not enter by reason of the state of tenant for life, which being determined, his entry is now accrued unto him for the forfeiture committed in the life of tenant for life.* Co. Comp. Cop. 66. f. 60.

Gilb. Treat. of Ten. 316. S. P. cites Supplement to Co. Comp. Cop. 170, 171. and says, that so it seems if tenant for life had

aliened to another his estate, though neither he nor his grantee could take advantage of this forfeiture, yet after his death it seems that he in remainder might.

12. Sometimes *be that is neither lord of the manor at the time of the forfeiture committed, nor ever after, shall take benefit of a forfeiture.* Co. Comp. Cop. 66. f. 60.

As if the lord of a manor grants a copyhold in fee,

and then grants frank-tenement or the inheritance of this copyhold to a stranger, the grantee, though no lord of the manor, nor able to keep any court, shall take benefit of forfeitures made by the copyholder; as if the copyhold do make a feoffment lease, waste, deny the rent &c. Co. Comp. Cop. 66. f. 60.

13. Regularly it is true, that *none can take benefit of a forfeiture but be that is lord of the manor at the time of the forfeiture.* Co. Comp. Cop. 65. f. 59.

[144] Copyholder for life; the lord makes a lease to commence

after the end, forfeiture, or determination of the estate for life; the copyholder commits a forfeiture & the lord will not enter; the lessee may. Gilb. Treat. of Ten. 229.

14. Adjudged, that where there is a *copyholder for life, and the lord leases for years, and the copyholder commits a forfeiture, the lessee may enter for the forfeiture.* Godb. 175. pl. 241. Pasch. 8 Jac. C. B. Meers v. Ridout.

15. If a copyholder makes a lease contrary to the custom, and the lord dies before entry or seizure for the forfeiture, he

or they in reversion or remainder shall never take advantage of the forfeiture committed before his or their time; per Cur. Cro. J. 301. pl. 6. Pasch. 10 Jac. B. R. Lady Montague's Case.

Gilb. Treat.
of Ten. 234.
cites S. C.

16. A *succeeding lord* of a manor shall not have any advantage of forfeiture by waste done by a copyholder in the time of the preceding lord; resolved. 2 Sid. 8, 9. Mich. 1657. B. R. in the Case of Chamberlain v. Drake.

Lutw. 799.
S. C. ad-
judged.—
Freem. Rep.
516. pl. 692.
Mich. 1699.
Anon. S. P.
and seems to
be S. C. ad-
judged by
3 justices
according-
ly; but
Powell J.
infisted,
that a copy-
holder was
but a tenant

17. M. and A. two *coparceners were ladies of a manor*; a copyholder suffers his house to be ruinous, and made a lease of his copyhold for 10 years. M. dies. The copyholder dies, and his wife entered, claiming her widow's estate, et bene, per Cur. For though this lease was a forfeiture, being a breach of trust, yet it is a personal wrong as much as waste, which cannot be transferred by descent, but must be took advantage of by him that is wronged; but the estate of the copyholder is not determined, because the lord may affirm it by acceptance of rent, and the election to affirm it or not, must be by both the parceners; the thing is entire, and therefore the surviving sister cannot elect; per three Justices. 1 Salk. 186, 187. pl. 5. Trin. 8 W. 3. C. B. Eastcourt v. Weeks.

at will in the nature of his estate, although his estate be so strengthened by custom, that so long as he observes the customs of the manor, it is not in the power of the lord to defeat or determine it; but yet the copyholder might determine it when he pleased. That when a copyholder took upon him to make a lease for years his estate was determined, and if his estate was determined, the heir might take advantage of it as well as his ancestor, but the other three judges being of another opinion, judgment was given for the defendant.

18. Treby took this difference, *That in some cases an heir might take advantage of a forfeiture, but that was of such acts as were as well extinguishtments of the copyhold estate, as forfeitures; as where a copyholder levied a fine, suffered a recovery, or made a feoffment with livery*, there the copyhold estate was extinguished, because the copyholder had taken upon himself to convey the freehold, which was inconsistent with a copyhold estate; but where a copyholder makes a lease for years, or commits waste, these are forfeitures at the election of the lord, and therefore if he takes no advantage of them by entry, but doth any act afterwards which admits him to be a copyholder, the forfeiture is purged; as if he receives the rent, or accepts a surrender, or amerces him in his court, but in the other case no act of the lord can purge the forfeiture, because in case of a fine, recovery, &c. the copyhold is utterly extinguished. Therefore if the lord to whom the wrong is done, doth not make his election to make it a forfeiture by entry, his heir shall never take advantage of it. He said, he agreed with the opinion of Rolle, that a feoffment with [without] livery, or a bargain, and sale without inrollment, are no forfeitures, because imperfect conveyances, and not executed. Freem. Rep. 516, 517. pl. 692. Mich. 1699. B. R. Anon.

[145]

(U. c) Advantage of a Forfeiture. At what Time it may be taken.

1. IF copyholder makes a lease not warranted by the custom, it will be a forfeiture *before the lessee's entry*; per Anderson Ch. J. Mo. 185. in pl. 329.

2. Offences which are apparent and notorious, of which the lord by common presumption cannot chuse but have notice, are forfeitures, *eo instante* that they are committed. Co. Comp. Cop. 63. f. 57.

3. As if by special custom, upon the descent of any copyhold of inheritance, the heir is tied upon three solemn proclamations, made at three several courts, to come in and be admitted to his copyhold, if he fails to come in, this failure is a forfeiture *ipso facto*. Co. Comp. Cop. 63. f. 57.

4. So if a copyholder be sufficiently warned to appear, and he fails, this is a forfeiture *ipso facto*. Co. Comp. Cop. 63. f. 57.

(X. c) Where one and what Tenant shall take Advantage of the Forfeiture of another Tenant.

1. WHERE there is tenant for life, remainder for life of a copyhold, and the tenant for life commits a forfeiture, he in remainder shall not enter, but the lord shall have it during the life of him by whom it was forfeited, but this shall not destroy the remainder without an express custom in such case; resolved. 9 Rep. 107. a. Pasch. 10 Jac. Podger's Case.

does not appear. — S. P. by Holt Ch. J. a Ld. Raym. Rep. 1000. Mich. a Ann.

2. A copyhold was granted to A. for life, and afterwards according to the custom, the reversion to B. for life, immediately after the death, surrender, forfeiture, or other determination of the estate of A. who was afterwards attainted of felony. The lord did not enter, and the king pardoned A. Afterwards B. in reversion entered, and adjudged lawful; upon which error was brought in the Exchequer-Chamber, and the error assigned was, that the reversioner for life could not take advantage of this forfeiture, but that the lord should have entered, and so have determined the estate of A. and then B. the reversioner might have entered on him, but all the Court held, that the estate for life was determined by the attainder, because a copyhold is but a tenancy at will in the eye of the law, and the attainder determined his will, so that he is disabled to hold any estate, and then he in reversion may take advantage of this determination. 3 Lev. 94. Mich. 34 Car. 2. Strode v. Dennison,

cannot hold it against his own grant.

3. If there be a *copyhold* estate for life, remainder to B. if tenant for life forfeit, it is not such a determination as to let in the remainder, but the lord shall enjoy it during the life of tenant for life. 12 Mod. 123. Pasch. 9 W. 3. Head v. Tyler.

(Y. c) Forfeiture. Of how much it shall be.

Goldsb.
189. pl. 126.
Oland v.
Bardwick
S. C. ad-
judged that
the husband
shall not
have the
corn; but
Clench
held, that
if he had
leased the

land, and the lessee had sown it, and then she had married, and the lord had entered, yet the lessee should have the corn.—Mo. 394. pl. 512. Oland v. Burdwick S. C. adjudged that the lord shall have the corn, and not the wife; but otherwise if her estate had ended by death, divorce &c.—Cro. E. 460. (bis) pl. 10. S. C. adjudged for the lord against the baron by Popham and Clench, contradicente Fenner, & absente Gawdy.

1. **A** Widow copyholder durante viduitate, according to the custom, *sowed the land, and before the corn was severed she married*; adjudged that the lord shall have the crop, because her estate was determined by her own act. So if she had leased the land for years, and afterwards married, the lessee having first sowed the lands, he shall not have the corn, for though his estate is determined by the act of a stranger, yet he shall not be (as to the first lessor) in a better case than his lessor was. 5 Rep. 116. Hill, 44 Eliz. B. R. Oland's Case.

This in Roll
is letter (E)

Fol. 509.

8. P. as to
waste done,
resolved.
4 Rep. 27.
a. pl. 15.
Trin. 26

Eliz B. R. Taverner v. Cromwell, where several acres are held by several copies, and by several rents, for though they are all in one and the same hand, yet every acre is held severally, and to every acre there is a several condition in law tacitly annexed, so that the forfeiture of the one cannot be the forfeiture of any one of the others; for the several conditions in law ensue the several tenures.—So where diverse copyholds are granted by one copy, and several habend. and several reddendums for every of them, but they all began at one time, and were to end at one time held the forfeiture of one is not the forfeiture of the other, for they are several grants and as several copies. Cro. E. 353. pl. 10. Mich. 36 & 37 Eliz. C. B. Taverner v. Lord Cromwel.—4 Rep. 27. a. b. pl. 5. S. C. & S. 1. resolved per tot. Cur. where the lord admitted the tenant tenendum per antiqua servitia inde prius debita et de jure consueta, or to such effect, and A. commits a forfeiture in B. Acre, he shall forfeit this only; for the tenendum reddendo singula singulis, doth continue the several tenures.—Supplement to Co. Comp. 74. f. 10. cites S. C.—Ibid. 65. f. 59. S. P.

[Z. c] In what Cases a Forfeiture of Part shall be a Forfeiture of the whole.

[1.] **I**F a copyholder makes a feoffment of an acre of land, parcel of his copyhold, all the copyhold is not forfeited by this, but only that acre. P. 41 El. B. R. between Fuller and Terry.]

[2. If a copyholder cuts down a tree which grows upon an acre of land, parcel of the copyhold; this is a forfeiture of all the copyhold, because the trees are to be employed in building and reparation of the houses and copyhold, and therefore by the doing of waste all the copyhold is impaired. P. 41 El. B. R. between Fuller and Terry.]

[147]
Het. 36.
Arg. cites
S. C.—

3. As to forfeiture of a part being a forfeiture of all, as by waste or feoffment, or denying of rent &c. it is not material whether the copyholds are in one or several copies, but only whether

that the tenure be one or several. 4 Rep. 27. b. says it was so adjudged upon demurrer. Hill. 35 Eliz. C. B. in Case of *Taverner v. Cromwell.* Gilb. Treat. of Ten. 231. 232. cites LexCustum. that by

Forfeiture of part so much only is forfeited, but if waste be committed in part, the whole by the same tenure is forfeited, for that goes to the destruction of the houses, and so of the whole copyhold estates, but if there be no building, quære; for he says it seems unreasonable then that waste in part should be a forfeiture of the whole, and so he says in case of seoffment of part.

*S. P. as to the waste in cutting trees in three acres, that it is a forfeiture of all the lands granted by that copy; per Cur. 3 Keb. 641. pl. 47. Pasch. 28 Car. 2. B. R. in case of *Paschall v. Wood.* Gilb. Treat. of Ten. 24 cites S. C. and says, that if a copyholder be seised by force of several copies of several parcels, by several tenures, if he commit a forfeiture in one, it is no forfeiture of the rest; as if he commit waste in part of black acre, it is a forfeiture of all that acre, and by the same reason, if waste be committed in one acre, it is a forfeiture of 20 acres, if held by one tenure, for the condition in law annexed to the whole estate is broke, and so the lord may enter for the forfeiture; but where there are several tenures, though they be in the hands of one copyholder, there are several conditions in law annexed to the several parcels, and therefore the breach of one is not so of the other. If such a copyholder surrenders to the use of another, and the lord admits him by one copy, tenend. per antiqua servitia, the several tenures remain; but if the admittance were by one tenure, then it seems a forfeiture of part would reach the whole, because the condition in law is but one; so if several copyholds escheat to the lord, and he grants them again, tenend. per antiqua servitia to A. and he commits a forfeiture in part, this extends not to the whole.

4. If several copyholders escheat to the lord, and he regrants them 4 Rep. 27. b. by one copy, the forfeiture of the one is not the forfeiture of the other. Co. Comp. Cop. 65. f. 59.

(A. d) Forfeiture. What shall be a Dispensation or Excuse thereof, and by whom it may be.

1. A Copyholder committed waste, and afterwards the lord accepted of the rent, the question was, *whether such acceptance barred him of his entry for the forfeiture?* Cook argued that it should not, for this being a condition in law, which when broken the estate of the copyholder is thereby merely void; and the Court agreed that the copyhold was in the lord presently by the forfeiture. Sed adjournatur. Mich. 28 & 29 Eliz. B. R. Godb. 47. pl. 58. Mich. 28 & 29 Eliz. B. R. Anon. If a copyholder does an act which extinguishes his copyhold acceptance of rent will not dispense with it; but otherwise

wife where it is a naked forfeiture. Gilb. Treat. of Ten. 316.

2. Steward's refusing to admit is a good excuse. Le. 100. S. C. cited Supplement to Co. Comp. Cop. pl. 128. Pasch. 30 Eliz. B. R. Rumney v. Eve.

25. f. 10. for there was no negligence in the party, he having prayed to be admitted.

3. The father commits a forfeiture and dies, the son is admitted as heir by descent. This purges not the forfeiture, because the father dying seised of no estate, the son cannot be admitted to any. Toth. 107. cites 30 Eliz. Smith v. Gilb. Treat. of Ten. 232. cites S. C. and says it seems unreasonable, for he thinks that the ancestor died seised of an estate, because nothing removes the legal estate and interest out of him but the lord's seizure.

the lord's seizure.

And where after the father's death the lord seized an heriot he could not afterwards avoid the heirs estate for that forfeiture, because the taking the heriot on the father's death *allowed of a dying seized*. Toth. 107. cites Hill. 1592. Bacon v. Thurley.

Gilb. Treat.
of Ten. 233.
cites S. C.

*4. If a copyholder makes *default at court*, and he is there amerced, though the amercement be *not estrated* or levied, yet it is a dispensation of the forfeiture; Held. Le. 104. pl. 136. Mich. 30 Eliz. B. R. in Sir John Braunch's Case.

Cro. E. 292.
pl. 5. S. C.
but S. P.
does not
appear.

5. The question was, whether the dismembring of the inheritance from the copyhold land, by the *feoffment of the manor*, has disabled every person from taking advantage of any forfeiture, and it was agreed with this *difference*, that all *forfeitures which accrue by reason of matters of the court, are discharged, but not forfeitures at common law, as waste and leases to the disherison*, but that the feoffee, as to such as are done in his time, shall enter and take advantage of them. Mo. 392, 393. pl. 508. Hill. 37 Eliz. B. R. the 4th point in Case of East v. Harding.

—Ow.
63. S. C.
and Popham
said, that
the feoffee
or lessee
shall have
advantage
of all for-
feitures belonging to land, as in case of feoffment and the like, but not for not doing fealty.

6. If the lord does any thing whereby he doth acknowledge him his tenant after forfeiture, this *acknowledgment amounts to a confirmation*; as if he *distrains* upon the ground for rent due after forfeiture, or if he *admits* after the forfeiture, or the like, these are *stoppels* to the lord, so that *he can never enter*, so the lord have notice of *such forfeitures* before any such act which may amount to a confirmation be done; yet some make this *difference*, that *these forfeitures only which destroy not the copyhold are confirmable* by subsequent acknowledgment, and not those forfeitures which tend to the *destructions of a copyhold*, as if the copyholder makes a feoffment, by this the copyholder is *destroyed*, and therefore no subsequent acknowledgment of the lord will ever save this fore. Co. Comp. Cop. 66. f. 61.

7. A copyholder *levies a fine, makes a feoffment, or suffers a common recovery*, which destroys the estate; in such case no acceptance of the rent, or act done by the lord shall be available to make the estate again good; but where the custom of the manor only is broken, as if the copyholder makes a lease of his copyhold lands for more years than one year, or denies to pay his rent, or denies to be sworn of the *homage*, or commits waste, there his estate may be afterwards confirmed, and there, and in such cases the acceptance of the rent by the lord will amount to a confirmation of the first estate. Supplement to Co. Comp. Cop. 76. f. 11.

8. In some cases, where an estate of a copyholder is forfeited by law, yet by custom, and the act of the lord in his court of the manor, the forfeiture may be mitigated, and the land shall be utterly forfeited or destroyed; as where the custom is, that for waste copyhold shall be forfeited, a custom to amerce the tenant for the waste done, and to *distrain* for the amercement will be a good custom to mitigate the forfeiture of the copyhold. Supplement to Co. Comp. Cop. 76. f. 11.

9. A copyholder commits voluntary waste, and afterwards the lord receives the rent without taking notice of the waste, *this has purged the forfeiture*, per Ch. J. King at Winchester assizes, and the old distinction between permissive waste and voluntary doth not now obtain, but in each case the receipt of the rent purges the forfeiture.

Cro. J. 166. pl. 4 Trin. 5 Jac. in case of Mantle v. Wollington. S. P. was made a question but

no resolution was given therein.—Supplement to Co. Comp. Cop. 76. l. 11. cites S. C. — J. Salk. 186, 187. S. P. held that the estate of the copyholder was not determined, because the lord by acceptance of the rent &c. might affirm it.

10. If copyholder commits a forfeiture, and *dominus pro tempore of any legal title, though at will, grants afterwards an admittance, this is a dispensation of the forfeiture*, not only as to himself, but as to him in reversion; for he may make voluntary grants; and such a new grant and admittance amounts to an entry for the forfeiture, and a new grant. But a lord by wrong or by disseisin cannot by such admittance purge the forfeiture so as to bind the rightful lord. Lev. 26. Pasch. 13 Car. 2. B. R. Milfax v. Baker. [149]

11. The lord after acceptance of the rent cannot enter upon the lessee of a copyholder; per Twifden J. in evidence to a jury at the bar. Keb. 15. pl. 43. Pasch. 13 Car. 2. B. R. Garrard v. Lister.

12. Where there is an actual entry by the lord in the life of the copyholder for a forfeiture by him, as by cutting down timber and selling it, no acceptance after will purge the forfeiture; and though it never was presented by the homage, it is not material, it being a thing notorious. 3 Keb. 641. pl. 47. Pasch. 28 Car. 2. B. R. Paschal v. Wood.

Gilb. Treat. of Ten. 233. cites S. C.

13. A copyholder cut timber and sold it, and died. The succeeding lord brought ejectment. The defendant pleaded, that in trespass brought by him the lord (now plaintiff) justified for taking a heriot; and per Cur. justification for heriot service on seisin of the ancestor is an acceptance of the heir as tenant, and purges the forfeiture; but otherwise of an acceptance, justification, or avowry for heriot custom. 3 Keb. 641. pl. 47. Pasch. 28 Car. 2. B. R. Pascall v. Wood.

Gilb. Treat. of Ten. 238. cites S. C. and same diversity, and says, that this proves that after the forfeiture the estate is in the

tenant, else the lord could not have a heriot; the reason for the difference seems to be, because in accepting of heriot service, he admits the heir tenant, but in accepting heriot custom, he only admits the tenant died seised, sed quære; for it seems to me to be a dispensation; for he admits him to be tenant after the forfeiture committed, and therefore if the lord accept of any services after he knows of the forfeiture; it is a dispensation; for why should not the acceptance and acknowledgment of the tenant to be tenant after a forfeiture, as well dispense with a forfeiture, as acknowledgment of the heir to be a tenant.

14. It seems, that if the lord accepts a surrender from a tenant who has committed a forfeiture, this is no dispensation or bar to the entry of the lord or his lessee, if the cause of forfeiture be such as the lord might well be supposed ignorant of, otherwise not; as making a private lease, and so is Cro. G. 233. *Mastbrow v. Whetton*; but for failure of suit of court, on non-payment of rent &c. it is otherwise; because he cannot be presumed

But an admision by the lord dispenseth with a former forfeiture. Toth. 107. cites 25 Eliz.

Clerk v. Wentworth, — But Lord Cornwallis's Case.

Lord Cornwallis Case was, that a copyholder commits treason, and then surrenders into the lord's hands to the use of some of his children, who were admitted, the question was, if this were such a forfeiture as the lord was bound to take notice of, and the court inclined, that the lord *shall not be presumed to take notice in this case, as he shall in the case of failure of suit of court, non-payment of rent &c.* 2 Vent. 38, 39. ut supra.

15. A copyholder for life suffered his house to be ruinous, and made a lease for 10 years. It was admitted per Cur. that these were both causes of forfeiture, and 3 justices held, that the estate of the copyholder was not determined, because the lord by acceptance of the rent &c. might affirm it. 1 Salk. 186, 187. pl. 3. Trin. 10 W. 3. C. B. Eastcourt v. Weekes.

[150] (B. d) Forfeiture. In what Cases the Lord may enter without Presentment.

Offences which are not forfeitures till presentment are such which by common pre-

1. **PRESENTMENT** is not of necessity, but for the lord's better instruction of his title, and he may, if he will, take advantage of a forfeiture before the presentment. Cro. t. 499. pl. 19. Mich. 38 & 39 Eliz. B. R. East v. Harding.

2. If a copyholder goes about in any other court to intitle any other lord unto his copyhold; or if he aliens by deed, these, and the like, ought to be presented. Co. Comp. Cop. 64. f. 58.

3. There is a real and a personal forfeiture of copyhold land; real is not necessary to be found by the homage, as was resolved in Brock's Case, personal forfeiture is necessary to be found. 4 Le. 241. pl. 393. Pasch. 8 Jac. B. R. in Ward's Case.

Cro. C. 233. pl. 15. Matthews v. Whetton, S. C. adjudged.

4. Copyholder leases for one year, and for another year to commence a day after the first year &c. and after surrenders his copyhold to the lord; the lord enters, and grants a lease for years; the lease by the copyholder was a forfeiture, and when the surrender was made to the lord, this lease was void against him, and his interest discharged without presentment and seizure for forfeiture by which his entry was lawful, and his lease for years good. Jo. 249. pl. 4. Mich. 7 Car. B. R. Matthews v. Whetton.

5. If there be a copyhold tenant for life, the reversion to the lord, and the tenant commits a forfeiture, the lord may grant the

the estate to another before any seisure; for it is a determination of the will, and the estate immediately in the lord as in his reversion. Lev. 26. Pasch. 13 Car. 2. B. R. Milfax v. Baker.

6. Steward of a manor *need not have an express authority in writing to make a demand and entry upon refusal to pay a fine for admittance of a copyhold tenant, and it is not necessary for the steward to make a precept for the seisure, but the demand must be personal.* 2 Mod. 229. Pasch. 29 Car. 2. in Scacc. Trotter v. Blake.

7. The lord doth not always make an *actual entry*, but generally a *precept to the steward to seise the land*, and that is a sign the lord hath a right, and that is in nature of a Habere Fac. Poss. and does not give title, but supposes it, because the copyhold is determined, or rather, because it appears to be *determined by the presentment that is made of such a forfeiture*; it is quite different from an entry which vests an estate, and it is the presentment (if any thing) seems to determine the estate, for the precept to seise is in the nature of an execution; per Lord Ch. J. 2 Show. 152. pl. 133. Hill. 32 & 33 Car. 2. B. R. in Case of Benson v. Strode.

8. If copyholder commits *waste* the lord may lease without an entry; per Dolben J. 2 Show. 152. pl. 133. Hill. 32 & 33 Car. 2. B. R. in Case of Benson v. Strode. And per Pemberton Ch. J. he may bring trespass.
and peradventure no entry is needful to maintain an *action for the mesne profits*. Skin 9. Mich. 23 Car. 2. B. R. Benson v. Strode.

(C. d) Forfeiture. To what Time the Forfeiture shall have Relation. [151]

1. IF a copyholder makes a *lease for years to commence at Michaelmas*, it is a forfeiture presently, per Hutton J. Cro. E. 499. pl. 29.
and none denied it, Het. 122. Mich. 4 Car. C. B. Harding Mich. 38 & 39 Eliz.
v. Turpin. B. R. East v. Harding.

— It is a forfeiture before the entry of lessee. Per Anderson Ch. J. Mo. 185. pl. 29

2. Though no advantage can be taken of a forfeiture for *treason* till attainder, yet after attainder it has relation, and the committing the treason is the forfeiture. Per Levinz J. 2 Vent. 39. Pasch. 35 Car. 2. B. R. in Lord Cornwallis's Case.

(D. d) Where the Forfeiture shall be to the King.

1. 35 Eliz. ENACTS, that *Popish recusants above 16 years*
cap. 2. shall within 40 days after their conviction repair to their usual dwelling, and not remove above 5 miles from thence, in pain to forfeit all their goods, and their lands and annuities, during life.

2. *A copyholder shall in this case also forfeit his estate during life (if his estate continue so long) to the lord of the manor, if such lord be no recusant convict nor seised or possessed in trust to the use of a recusant; for then the queen shall have the forfeiture.*

3. If a copyhold given to *superstitious uses* comes to the king by the statute the copyhold is destroyed, and the uses void; but the king does not thereby gain the freehold of the copyhold, but that remains in the lord of the manor; resolved. Godb 233. pl. 322. Mich. 11 Jac. C. B. Bagnall v. Potts.

4. *The king grants the office of the custody of a house for life; this is a good lease for life notwithstanding it is copyhold, and it is not necessary to recite in the grant that it is copyhold; and after the estate for life is determined, the king may grant again by copy of court-roll the house and land, because the king's grants shall be taken favourably, and not extended to two intents where there is no necessity for it, as there is not here, and we are not here to intend a collateral intent, and so the copyhold is not destroyed, for the law takes care to preserve the inheritance of the king for his successors, and it may be a benefit to the king to have it continue copyhold, viz. to have common &c. and his election is also destroyed if he may not have it copyhold; adjudged. Sty. 272. Pasch. 1657. Cremer v. Burnet.*

[152] (E. d) In what Cases of Forfeiture Equity will relieve.

1. **TOUCHING** copyholders Mr. Fitzherbert in his Natur. Brev. fol. 12. noteth well, that forasmuch as he cannot have any writ of *false judgment*, nor other remedy at common law *against his lord*, and therefore if the lord will put out his copyholder that payeth his customs and services, or will *not admit him, to whose use a surrender is made*, or will *not hold his court* for the benefit of his copyholder, or will *exact fines arbitrary* where they be customary and certain, the copyholder shall have a subpœna to restrain or compel him as the case shall require. Cary's Rep. 3, 4. cites D. 264. and 124. Fitz. Subpœna. 21.

2. The defendant would not admit the plaintiff to his copyhold; for that the plaintiff committed a *forfeiture in cutting down woods* upon the copyhold, the defendant [was] ordered to admit the plaintiff tenant, for that the defendant *could not prove that the same was done by the plaintiff's directions*, but by a tenant. Toth. 237, 238. cites 25 Eliz. li. B. Fol. 78. Taylor v. Hooe.

3. A forfeiture for *cutting down timber* without licence, and employing it upon his copyhold was held relievable upon paying a competent fine. Toth. 108. cites 1591. Per Clench J. in Case of Commis v. Kinmill.

4. Copyholder durante viduitate *cut timber*, and the copyhold was seised for *wilful waste*. Upon a bill by the widow for

For relief, Bridgman K. declared, that in case of a *wilful forfeiture* he could not relieve, but upon the hearing *directed an issue, whether the primary intention* in selling the timber *was to do waste*; but as the order was drawn up, the issue to be tried was, if the supposed waste was wilful or not; upon two several trials it was found for the plaintiff, and so it was decreed, that plaintiff should be relieved, and the defendant to deliver possession, and account for the mesne profits. Ch. Cases 95. Hill. 19 Car. 2. Thomas v. Porter and Bp. of Worcester.

S. C. says the Lord Keeper being pressed to alter the issue, he would not. — Ch. Prec. 571. cites S. C. but said there Arg. to be mon-

strous, but recites it to be, that the lord had upon two trials at law recovered verdicts, and that he was decreed not only to account for the mesne profits, but also to pay costs. [But it seemed to be misquoted. Vide.] — 2 Vern. 664. pl. 590. Arg. cites S. C. of an issue, whether waste to commit a forfeiture.

5. The grandson and heir of a person convicted and executed for *felony*, by which his lands were *forfeited* to the lord of the manor, brought his bill for *discovery* and delivery of certain old deeds which the lord had got into his custody, and which were relating to the lands, and were formerly in the hands of the plaintiff's ancestor; the Court retained the cause to enable the plaintiff and his heirs to the use of the depositions therein at any trial at law, and defendant to do the same, and plaintiff to have *recourse to the rolls &c.* of the manor, and have copies, paying for the same, and as many to be produced at a trial at plaintiff's costs as plaintiff required. Fin. R. 249. Pasch. 28 Car. 2. Draper v. Zouch.

6. A. having *two copyholds* within the same manor, *cut timber on one, and repaired the other with it*; the lord had brought ejectment and a verdict for the forfeiture. A. is relieved against the forfeiture, but ordered to pay costs both at law and here. 2 Vern. R. 537. pl. 481. Hill. 1705. Nash v. E. of Derby.

Ibid. 665. cited S. C. — Ch. Prec. 574. cites S. C. and says, there was only a mis-

take whether the steward or the woodman should set out the

7. A tenant by copy *letting a copyhold tenement fall down* after repeated admonitions and presentments of the jury of the waste for several years together, and the copyhold being seized for a forfeiture, brought a bill, but Lord Harcourt would not relieve him, because on these circumstances it was equal to voluntary waste. Ch. Prec. 574. cites it at the Case of Con v. Hickford.

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2 Vern. 664. pl. 590. Mich. 1710. Cox v. Higford. S. C. says there was a rule of court to pay costs, and to

repair, but he not repairing the bill was dismissed. — Equ. Abr. 121. pl. 20. S. C. says that after six several presentments upon him to repair it, and an entry by the lord for the forfeiture he brought an ejectment; and when upon the trial, a rule was entered into by consent, and made a rule of court, that upon payment of 4 l. to the lord for his costs, (which were not a 4th part of the costs he had put the lord to) and putting the estate into repair, he should be admitted to it again, yet he never complied with the rule, nor made any offer of costs to the lord, but instead of that brought another ejectment, and was nonsuited; and now, after 9 or 10 years time more, brings his bill, and had been several times amerced for not appearing at the court, and refused so do fealty, either upon oath, (or being a Quaker) upon affirmation, and upon these circumstances Lord Keeper declared he ought to have no relief, or if he were to be relieved, yet it must be upon payment to the lord of all his costs, and putting the estate into good repair, which would be more charge to him than his interest in the estate would be worth, having only an estate for life therein, and dismissed the bill, but with costs; and Lord Keeper likewise declared, that though this were a voluntary waste and forfeiture, (against which it was objected this court never gave relief) yet he thought

thought the rules of equity not so strict, but that relief might even be given against voluntary waste and forfeiture.

Ch. Prec. 574. for refusing to swear fealty was relieved on the circumstance of the case, cites it as the case of Edmore v. Craven.

8. *Forfeiture by a quaker for not doing suit and service* was relieved. Cited 2. Vern. 664. pl. 590. Mich. 1710. as the Case of Cudmore v. Raven.

9. Copyholder made *leases not warranted by the custom*, and worked a quarry of stone without a licence, and died, having on his marriage surrendered to the use of himself for life, with remainder to his first and other sons in tail male, remainder to himself in fee, but no admittance was made on such surrender. Afterwards his son and heir cut down trees, and inclosed some of the land, notwithstanding several admonitions from the lord, who brought his *ejectment*, and had a verdict as for a forfeiture. On a bill brought by the copyholder for relief, Lord Macclesfield was clear, that there was no foundation for equity to interpose; that making a lease for years without licence was a forfeiture, as it was a determination of his will, and though the lord should refuse to grant such licence, yet the tenant has no remedy, nor would this Court compel the lord to grant such licence; that the customs are in the nature of the limitation of an estate which determines on the breach of them, that unless there were some equitable circumstances in this case, this court cannot interpose, which would be to repeal and destroy the law. Ch. Prec. 568. pl. 347. Trin. 1721. Sir H. Peachy v. D. of Somerset.

10. In case of non-payment of rent or fine, Chancery may relieve a copyhold tenant; for the estate in such cases is but in nature of a security for those sums, and the lord may be recompensed in damages; per Lord Macclesfield. Ch. Prec. 572. Trin. 1721. in Case of Sir Hen. Peachy v. Duke of Somerset.

11. A. a copyholder by surrender is to be only tenant for life, then to his first and other sons in tail male successively, remainder to himself in fee, but no admittance is made on such surrender. A. commits a forfeiture; it was held clearly, that A. continued, and was to be considered as absolute tenant to the lord, and though A. having a son was but a trustee for him of the inheritance of these lands, yet the whole inheritance quoad the lord was in A. and any act of forfeiture done by A. would bind [154] the inheritance, because there must be always some tenants to answer for the whole; but if there had been an admittance of A. for life, and of the son in remainder, because they come as it were by two distinct grants from the lord himself, the acts of the one will not affect the other; but till there is an admittance on such surrender, the lord is not bound to take notice of it, but the tenant has the same estate as before to all intents and purposes, and the rather, because the lord has no means to compel him to come in and be admitted on such surrender;

surrender, but if the son should bring a bill against A. and the lord, to compel an admittance pursuant to such surrender, it might come then to be considered, how far this forfeiture of the father's should affect the son. Ch. Prec. 472. Trin. 1721. Sir H. Peachy v. D. of Somerset.

(E. d. 2) Forfeiture. How to be proved.

1. **F**OR a lord of a manor to avoid a copyhold estate for a forfeiture by making of a lease of his copyhold land, contrary to the custom, there ought for to be *very direct, and certain proof* made of a certain lease, with a certain beginning and ending with it, and so in like manner of any other thing supposed to be acted and done by a copyholder, and contrary to the custom of the manor, thereby to make a forfeiture of his copyhold estate; this must all appear certainly to the Court, and the *oath of a stranger made in the lord's court* to this purpose, shall not be of any force or effect to prove a forfeiture, especially when the copyholder still continues in possession, and so dies seised of his copyhold estate, and this never came in question till after his death; and if such a presentment, as this was, in the lord's court shall be allowed of, upon such an oath made by a stranger, as to make a forfeiture of a copyhold estate, every copyholder then might be in continual danger to lose his copyhold. Bulst. 189, 190. Pasch. 10 Jac. Hamlen, als. Lord Montague's Case.

2. The Court did also clearly agree, that if the copyholder did promise for to make such a lease, and it is not proved in fact, that he did make the same, this is no cause for to make a forfeiture of his copyhold estate. Bulst., 190. Pasch. 10 Jac. Hamlen v. Hamlen.

[F. b] What Thing will be an Extinguishment of a Copyhold.

1. **T**HE *severance of the freehold* and inheritance of the land, held by copy of the manor does not extinguish or determine the copyhold estate, for the custom hath established his estate, so that the lord cannot oust him so long as he pays and performs his customs and services. Co. 2. Lane 17. resolved.]

This in Roll is letter (H.) in fol. 510. Mich. 28 and 29 Eliz. C. B. the 3d resolution. — 4 Rep. 26. b. pl. 12. 30 Eliz. B. R. in Case of

Melwich and Luter S. P. resolved. — Cro. E. 103. pl. 10. S. C. & S. P. resolved. — The lord by this act cannot, without the concurrent act of the copyholder himself, determine the estate and interest which the copyholder has in his copyhold, and therefore the severance of the freehold and inheritance of the land holden by copy of court roll [155] (being done by the act of the lord) doth not determine the copyholder's estate, or extinguish the copyhold; for although that the estate of the copyholder be but an estate at will, viz. Ad voluntatem domini secundum consuetudinem manerii, yet custom has so established the estate of the copyholder, that he is not removable at the will of the lord, so long as he performs the customs and services. — Supplement to Co. Comp. Cop. 73. f. 8. cites 2 Rep. 17 in Lane's Case. and 4 Rep. 21 Brown's Case. — If the copyholder will join with the lord in a deed of

seoffment

feoffment of the manor, there, by that act of them both, the copyhold is extinct, as it was said by the Lord Anderson. Ch. J. Pasch. 24. Eliz. C. B. Supplement to Co. Comp. Cop. 73. f. 8.

Gouldsb. [2. If a copyholder in fee accepts a lease for years of the same land from the lord, this determines his copyhold estate. Co. 2. Lane 16. b. 17. resolved.]

34. S. C. & S. P. agreed by the court, and all the serjeants. — S. P. agreed per tot. Cur. Godb. 11. pl. 16 Pasch. 24. Eliz. C. B. — S. P. said Arg. to have been adjudged. Cro. J. 84. pl. 8. Mich. 3 Jac. — S. P. by Dodridge J. 3 Bulst. 81. — Bulst. 32. S. P. per tot. Cur. Anon. — 4 Rep. 31. a. b. pl. 24. Mich. 18 & 19 Eliz. S. P. accordingly. — And it is all one as if the copyholder had accepted immediately a lease for years of his copyhold, as was adjudged in Hyde's Case; for the reason in both cases is the same, viz. that copyhold interest and estate for years, cannot be in one and the same person, and at one and the same time, of one and the same land, without confounding the less; and besides, they are of divers natures, and cannot stand together in one and the same person. 2 Rep. 17. a. resolved. — Gilb. Treat. of Ten. 209. cites S. C. and says, that by the same reason a release upon that lease will pass the freehold and inheritance to him. — Ibid. says that though by taking a lease for years the copyhold is determined, yet he may grant it by copy to another; and if the copyhold afterwards comes to the lord's hands, and he aliens the manor by fine &c. the alienee may regrant it.

Le. 170. [3. So if there be a copyholder in fee of lands, and the pl. 237. lord leases to another for years, who assigns over the term to the Mich. 30 copyholder, this extinguishes his copyhold estate, for this is all & 31 Eliz. one as if he had accepted this lease from the lord himself. C. B. Smith Co. 2. Lane 17. resolved.] v. Lane S. C. held accordingly.

— And 191. pl. 227. S. C. adjudged; for both the interests cannot be in the same person Simul & Semel, and consequently one of them must be determined, which must of necessity be the customary estate; for the estate at common law cannot merge in that, and when common law and custom come together, and the one or the other must necessarily have prerogative, and stand, the common law shall be preferred and take place before the custom. — Gouldsb. 34. pl. 9. S. C. adjournatur. — By acceptance of a lease for years by the copyholder the copyhold is extinct; agreed per tot. Cur. Godb. 11. pl. 16. Pasch. 24. Eliz. C. B.

4. C. purchased a copyhold of A. to himself, his wife, and child, for their lives, and afterwards A. granted a lease of the same lands to B. for his life, with livery of seisin, reserving a rent, and after that levied a fine of the said premises in C. who accepted the rent of B. The question was, if the copyhold was extinguished? D. 30. b. pl. 207. Hill. 28 H. 8. in Canc. Compton v. Brent.

5. The lord devised [demised] a copyhold to C. for life, and after passed the freehold, and soil thereof by livery of seisin thereof to B. for life, reserving a rent, and then by fine levied doth grant the said land to the said C. (come ces que il ad de son done &c.) And C. accepteth the said rent of B. and thereupon it was questioned, whether or no the copyhold of C. were gone in conscience. Cary's Rep. 8. cites 28 H. Pasch. 248. D. 30.

6. If a copyholder joins with his lord in a feoffment of the manor, the copyhold is thereby extinct; agreed per tot. Cur. Godb. 11. pl. 16. Eliz. C. B. Anon.

* Godb. 7. Tenant by copy took a lease for 21 years of the manor; Shute 101. pl. 117. Baron held, that upon the expiration of the 21 years the Mich. 28 copyhold is not determined; for though the copyholder has and 29 Eliz. only an estate at will at the common law, yet he has an estate S. P. but Anderson Ch. J. held, of inheritance by the custom of the manor, which is not deter- that in such mined by the acceptance of the lease for years; for * if a sur- render

render is made of a copyhold into the hands of the lessee for years, to the use of the lessee for years, and his heirs, and the years expire, yet he shall have admittance to the copyhold. Sav. 70, 71. pl. 146. Pasch. 25 Eliz. in Scacc. Anon. case the copyhold is extinct; for the estate in the copyhold is

not of right, but an estate at will, though custom and prescription had fortified it. — S. P. Arg. said to have been adjudged. Cro. J. 84. pl. 8. — Godb. 101. pl. 117. Mich. 28 and 29 Eliz. C. B. Wray said it had been resolved by good opinion, that if a copyholder accepts a lease for years of the manor, the copyholder is extinct for ever. — Supplement to Co. Comp. Cop. 73. f. 8. S. P. — Cro. E. 7. pl. 5. Trin. 24 Eliz. C. B. Anon. Mead said it was adjudged in Newport's Case, that by taking a lease of the manor the copyhold was extinct. — Mo. 185. pl. 330. Mich. 26 Eliz. S. P. the court held the copyhold gone for ever, and that the lessor being lord shall gain it after the lease to himself; and Meade J. cited it as adjudged in C. B. Hide v. Newport. — 4 Rep. 31. b. 24. cites Pasch. 17 Eliz. Hide's Case adjudged that the copyhold has no continuance; but says it was resolved in the same case, that such lessee may regrant the copyhold again to whom he will, for the land was always demised or demisable.

8. If a copyholder sues execution of a statute against the lord of the manor, and has the manor in execution, and afterwards levies the debt, his interest in the copyhold remains; per Manwood Ch. B. Sav. 71. pl. 146. Pasch. 25 Eliz. in Scacc. Anon. Gillb. Treat. of Ten. 287, 288. cites S. C. and says that the lessee be-

ing lord for the time may make voluntary grants of his own copyhold lands as well as of others that come into his hands; for though they are not copyholders (nor are they so when copyholds elcheat) yet they have copyhold lands that have been demisable time out of mind.

9. The lord granted the freehold of a copyhold to a stranger; the copyholder being in possession released to the grantee all his right in the land; per Anderson Ch. J. this does not extinguish the copyhold. Cro. E. 21. pl. 2. Trin. 25 Eliz. C. B. Anon. For the land remained copyhold and the custom is not taken away. Cro.

J. 126. Lashmer v. Avery. — Gillb. Treat. of Ten. 304. cites S. C. and the same diversity. — Otherwise if it had been to the copyholder himself. Cro. E. 24. pl. 3. Hill. 26 Eliz. C. B. Stockbridge's Case. — Supplement to Co. Comp. Cop. 73. f. 8. cites S. C.

10. Husband and wife copyholders to them and their heirs; the husband for money obtains an estate of freehold to him and his wife, and the heirs of their bodies. The baron died, leaving issue; the wife entered, and suffered a common recovery. The heir entered by the statute of 11 H. 7. and agreed that his entry was lawful, for that the copyhold, by the acceptance of the new estate, was extinguished. Cro. E. 24. pl. 3. Hill. 26 Eliz. C. B. Stockbridge's Case. Co. Comp. Cop. 73. f. 8. cites S. C. — Gillb. Treat. of Ten. 286. cites S. C.

11. A copyholder in fee took a lease for years of the manor. Resolved the copyhold was extinct for ever, and not only during the lease. Mo. 185. pl. 330. Mich. 26 and 27 Eliz. Hide v. Newport. S. P. cited as adjudged Pasch. 17 Eliz. in Hyder's Case 4 Rep.

31. b. in pl. 24. — S. C. cited per Cur. 2 Rep. 17. as adjudged; for the copyhold estate and interest for years of one and the same land cannot stand simul and semel in one and the same person, at one and the same time, without confounding the less; and likewise they are of diverse natures, for which reason also they cannot stand together in one and the same person.

12. Copyhold lands demised to 3 sisters, habend. to them for their lives successive; the first accepted a lease to herself, remainder to her husband, and another remainder to the 2d sister. Gillb. Treat. of Ten. 285. cites S. C. and says

that this judgment might be given and the first point be left undetermined; for if her copyhold estate

The 2d. agreed to it in pais 4 daies after; per Shute J. it is no good agreement, because afterwards, but had it been at the making the lease it had been a full extinguishment; per Clench J. the entry of the youngest is lawful notwithstanding the life of the eldest, but Gaudy J. contra, and judgment against the younger. 2 Le. 73. pl. 97. Trin. 28 Eliz. B. R. *Curtis v. Cottle.*

were extinct by acceptance of the remainder, then to be sure her entry was not lawful, and if it were not determined, yet it was held the younger sister's remainder could not take place, because according to *Pondor's Case*, the remainder was not to commence till after the estate for life ended; sed quare farther, whether the youngest sister's remainder be not in this case destroyed? for the estate for life of the eldest sister is utterly gone; for the lord having made a lease, can take no advantage of the forfeiture, and then the remainder not commencing when the particular estate ends, it seems it can never commence, for there is as much reason to destroy contingent remainders of copyholds, as freehold estates, and this is not like the case where the lord seises the particular estate as a forfeiture, for there it remains (as it seems) to support remainders.

13. Wheresoever a copyhold is become not demiseable by copy, by the act of the lord, by the act of the law, or by the act of the copyholder himself, it is extinguished for ever. Co. Comp. Cop. 66. f. 62.

14. If a copyholder with licence makes a lease for years to a either stranger, or without licence makes a lease for years to the land, the copyhold is not hereby extinguished, and yet it is not demiseable by copy. Co. Comp. Cop. 66. f. 62.

15. So if a copyholder intermarries with a feme seignoresse, this is a suspension only of the copyhold, but no extinguishment. Co. Comp. Cop. 66. f. 62.

16. So if the interruption be tortious, as the lord be disseised, and this disseisor seised; or if the land be recovered, by false verdict, or erroneous judgment, and after the land is recontinued, it is not extinguished but may be granted again by copy, for non valet impedimentum quod de jure non sortitur effectum, & quod contra legem fit, pro infecto habetur. Co. Comp. Cop. 66. f. 62.

S. P. The common recovery was to the use of themselves for life, remainder over, and it was held by Anderson, Mead, and Periam, that the copyhold was extinct, for by the recovery the baron had gained an estate of freehold, but they all held that by the intermarriage it was only suspended. Cro. E. 7. pl. 5. Trin. 14 Eliz. C. B. Anon. — Gilb. Treat. of Ten. 238. cites S. C. for by suffering the recovery the lands were conveyed by common law conveyance, and so the custom was broke.

17. A feme sole was lady of a manor, to which were divers copyholders, one of the copyholders did marry with the seignoresse of the manor. It was the opinion of the justices, that the intermarriage was only a suspension of the copyhold, and not an extinguishment of it. But afterwards they joined in suffering a common recovery of the land, and upon that their act it was resolved, that the copyhold was extinguished. Supplement to Co. Comp. Cop. 73. f. 8. Anon.

8 Rep. 63. b. Swain's Case. S. C. The citate of a copy-

18. The queen seised of the manor of D. made a lease thereof for years to J. S. excepting the trees. King James granted the reversion to the plaintiff; the custom of the manor was, that a copyholder of the manor might top and lop trees. The defendant being

being a copyholder, cut trees for firewood, for which trespass was brought; resolved, that the action did not lie, because the copyholder was in by *the custom*, which was *paramount the exception of the trees in the lease*, and the exception should not hinder the custom, although the copyholder came to his estate after the exception. Mo. 811. pl. 1098. 1 Jac. Swain v. Beckett.

holder that comes in by a voluntary grant is not derived out of the estate or interest of the lord of the manor, for

he is only an instrument to make the grant, but *the custom* of the manor after the grant made establishes and *makes it firm* to the grantee, so that though the grant be new, yet the title of the copyholder is ancient, and so ancient that this by force of the custom exceeds the memory of man and such grantee shall have *estovers &c.* to which the copyholders before were intitled. — Copyholder that comes in by voluntary grant shall not be *subject to the charges or incumbrances* of the lord before the grant. 8 Rep. 63. b. in Swain's Case. — Brownlow 231, 232. S. C. adjudged. — Supplement to Co. Comp. Cop. 72. cites S. C. and the Lord is but an instrument to make the grant. — Gilb. Treat. of Ten. 193. cites S. C. accordingly; and therefore if copyholders have used to have common in the lord's waste or estovers in his wood, or any other profit appender in any other part of the manor, and the lord alien the waste or wood by feoffment or fine, and then grant an estate by copy, the copyholder may take the profits in the hands of the alienee, for the custom unites the incident to the principal, as to the copyholder who claims, paramount the severance. If the alienation be by fine, and he does not claim within 5 years, it seems he is barred. This proves that the copyholder claims by custom, not by the lord, for if he did the feoffment would bar him of his common.

19. If there be *lessee for life*, the *remainder for life of a copyhold*, and the 1st. *tenant for life purchaseth the freehold of the copyhold*, and afterwards *levieth a fine* thereof and 5 years pass, it was adjudged, that in the case by the fine levied the copyhold was not gone nor destroyed, and that this *fine was not a bar to him who was in remainder in life of the copyhold*. Supplement to Co. Comp. Cop. 73. f. 8. Mich. 9 Jac. in C. B. adjudged accordingly. [153]

20. In ejectione firmæ brought by W. B. against R. H. for land in P. upon a lease made by J. B. upon a special verdict found, it was resolved, that when a *copyholder bargains and sells his copyhold to the lord of a manor which has the manor in lease for years*, that thereby the copyhold estate is extinguished. Hutt. 65. Trin. 19 Jac. Blemmerhasset v. Humberstone.

Jo. 41. Blevverhasset v. Humberstone, S. C. adjudged, that the copyhold was extinguished;

for though a copyholder cannot transfer to another but by consent of the lord, and in court, and admittance, yet he may release to the lord, because this is no prejudice to the lord, for at common law he is only tenant at sufferance.

21. A copyholder *bargained and sold his copyhold estate to the lessee of the manor*; resolved, that the copyhold estate is extinguished. Hutt. 65. Trin. 19 Jac. Blemmerhasset v. Humberstone.

Win. 66. Pasch. 21 Jac. C. B. Hasset v. Hanson, S. C. —

Jo. 41. pl. 2. Blevverhasset v. Humberstone, S. C. and the whole court agreed that this was an extinguishment of the copyhold. — Hutt. 65. S. C. says it was agreed here, that this copyhold is not so extinct but the lord (which is the lessee for years) dominus pro tempore may grant it de novo by copy. — Gilb. Treat. of Ten. 284, 285. cites S. C. & S. P. for the lessee is lord of the manor, and so the lands are always demisable by copy, and that there can be no difference between this case, and where the manor is conveyed away, together with the copyhold, at one and the same time.

22. If a copyholder *releases to the lord* it is an extinguishment of the copyhold, though it be contrary to the nature of a release

a release to give a possession; per Hobart Ch. J. Hutt. 65. Trin. 19 Jac. in Case of Blemmerhasset v. Humberstone.

23. *H. 8. was seised of the manor of Chinckford in Essex in fee, and built a new house there, called Lorrimore, and granted the custody thereof to Sir John Gates for life, by the word concessimus, with the close called Scales, being parcel of the copyhold of the said manor, but without reciting that it was copyhold, and this was for exercising his said office. The king died. Sir John Gates died; then Queen Mary granted the said manor in fee to Susan Tongue, who leased the manor for years to one Lee, and he, before the expiration of his lease, granted this close to Robert Lee in fee, according to the custom of the manor; Robert Lee's lease expired, and Robert Lee leased it to Field, the plaintiff, at will, and the defendant, as heir to Tongue, entered &c. The question was, whether the grant of the king, without reciting that this close was copyhold, had extinguished the copyhold custom, or not, and enfranchised the close? Newdigate J. held the copyhold destroyed, but Glyn Ch. J. held, that it was only suspended during the life of Sir John Gates the patentee, and judgment by Glyn Ch. J. and Warburton was given for the plaintiff. 2 Sid. 17. 35. 81. 137. Hill. 1658. B. R. Field v. Boothby.*

24. *If A. is tenant in tail of a copyhold, and it is found that by the custom it cannot be barred but by seizure of the lord, & non aliter nec alio modo, and A. accepts a feoffment of his copyhold lands from the lord that has the inheritance, and then makes a feoffment thereof, and then levies a fine with proclamations, and suffers a common recovery, the copyhold is suspended, but not destroyed, quoad his issue; but if A. afterwards levies a fine of the land, though the copyhold interest cannot pass, yet it may be barred and extinguished by the fine. Adjudged. Cart. 6. 22, 23. &c. Pasch. 17 Car. 2. C. B. Taylor v. Shaw.*

[159] 25. *Tenant for life of a manor with power to make leases makes a lease of a copyhold, this destroys it for ever; per Holt Ch. J. Lord Raym. Rep. 270. Mich. 9 W. 3. in Case of Winter v. Loveden.*

Freem. Rep. 508. pl. 682. S. C. though if a lessee of a manor makes leases of the copyholds, it does not extinguish them, yet when a lessee by virtue of a power demiseth, this is an absolute destruction of them, because the power is derived out of the fee, and so it is all one as if tenant in fee-simple of a manor made lease.

26. *A. is a copyholder in tail, the lord grants the freehold of the copyhold to him in fee; the copyhold though intailed is extinct. 3 Wms's. Rep. 9 Trin. 1724. Dunn v. Green.*

[G. d] *What shall be said an Extinguishment of the Incidents of a Copyhold.* *[Frank-Bank.]* This in Roll is letter (1) in fol. 510.

[1.] If there be a custom of a manor that if copyholders for life die seised, their wives shall have it during their widowhood, and *A. being a copyholder for life of a tenement, the lord of the manor conveys the freehold and inheritance of the copyhold tenement of A. by the procurement of A. to J. S. a stranger, and to his heirs during the life of A. the remainder to B. the wife of A. for life, the remainder in fee to A. and after A. grants the remainder to W. his son, and after B. the wife of A. dies, and A. takes C. to wife, and dies seised; the widowhood of C. is not extinguished by the purchase and conveyance of A. her husband, for the freehold being in J. S. a stranger, during the life of A. the estate of A. was not extinguished, and by consequence this excrement estate, scilicet the widowhood, continues.* Hobart's Rep. 244. between *Howard and Bartlett.* Hob. 181. pl. 218. S. C. resolved. — a Roll. Rep. 178. Trin. 18 Jac. B. R. Walter v. Bartlett. Haughton J. held, that though the frank tenement be severed from the manor yet he may properly be said to be a

copyholder of the manor; for he shall pay his ancient services to the lord of the manor; and Doderidge J. said, that the estate which the tenant had at the time of his death is not a new, but an ancient estate, whereupon it was adjudged, that the feme shall have her widow's estate. — Cro. J. 573. pl. 1. *Waldoe v. Bartlett* S. C. adjodged accordingly; for the custom is continued quoad her, though the freehold be severed from the manor; for the lord's act shall not prejudice the copyholder's estate, and it is a privilege and benefit annexed by the custom to his estate that his feme shall have it after his death, which shall not be destroyed as long as the copyhold estate remains undestroyed; and the copyhold estate here remains notwithstanding the severance from the freehold, and not only as a privilege, but as a mere copyhold. — Ibid. says it was resolved in the court of wards, by the 2 Ch. J. and Ch. B. that the copyhold remained &c. [this refers to the case in Hob.] — Palm. 111. *Walder v. Barkley* S. C. adjodged. — And a difference was taken in the books between Incidents to the Tenancy, and Incidents to the Seignory, that the first are not destroyed but the last are, and though it be destroyed between them, yet it shall be in essence as to this purpose. — Jenk. 318. pl. 15. S. C. and the estate of B. hindered the destruction of the copyhold, and though by the feoffment it be destroyed as to the lord, yet it is not as to the copyholder.

[2.] So if A. be a copyholder in fee, where the custom is for their wives to have their widowhood if the baron dies seised, and the lord grants the freehold and inheritance over to a stranger; this shall not destroy the widowhood. Hobart's Reports 244.] Hob. 181. pl. 218. Howard v. Bartlett, but as it is put there it seems to intend that if the freehold had been granted in fee during the life of A. it would not destroy the widowhood.

[3.] But in the said case, if the custom be that the wife shall be admitted before she shall have her estate, there she must lose it, because the customary court, which should relieve her, is gone as to her, because her estate is altogether estranged from the manor. Hobart's Reports 244.] [160] Fol. 511. Hob. 181. pl. 218. Howard v.

Bartlett seems to be S. C. & S. P. seems admitted.

4. *A. was lord of a manor of whom Black Acre is held by copy of court roll in fee according to the custom. A. made feoffment of Black Acre to a stranger. B. dies. Though the* a Lc. 208. pl. 257. Beale v. Langley,

S. C. and the whole court held, that the copyhold did remain; for otherwise by such practices of the lords all

feoffee has not any court so that the heir of B. cannot be admitted, nor the death of his ancestor presented, because but one tenant, yet per Cur. the copy shall bind the feoffee and the ceremony of admission not necessary in this case, and the lord by his own act has lost the advantages of fines, berietts, and other such casualties. 4 Le. 230. pl. 364. Mich. 29 Eliz. C. B. Bell v. Langley,

the copyholds in England might be defeated, and if any prejudice comes to the lord by this act, it is of his own doing, and shall not be relieved against his own act. Periam J. held, that by this lease the lord had destroyed his seignory, and lost the services as to this land; and Windham J. said the lord had destroyed the custom as to the services, but not as to the customary interest of the tenant; but Anderson Ch. J. held, that the rents and services remain, and if the copyholder after such lease commits waste, it is a forfeiture to the lord, and that will fall in evidence at a trial, though such waste cannot be found by an ordinary presentment, and the same law which allows the copyholder his copyhold interest against this lease, will allow to the lord his rents and services; and he said, that the lord shall have the rents and services, and not the lessee. But the reporter says, quod mirum, against his own lease!

5. A copyholder had *common by usage* in the waste of the lord as to his messuage and lands belonging; *the copyhold comes to the lord, who after grants the same to the copyholder cum pertinentiis.* In this case it was holden, that these words, viz. (cum pertinentiis) could not create a new common, and the common first holden was by custom annexed to the customary estate, and was absolutely extinguished. Co. Comp. Cop. 73. f. 8,

Gilb. Treat. of Ten. 286. cites S. C. for they are not copyhold in his hands,

6. If copyhold land *escheats*, the Chief Justice said he knew not how it could be called copyhold land afterwards, unless it be because there is a power in the lord to regrant it as copyhold, for if by the custom, the wife was dowable of the intiertry or moiety, and such customary copyhold escheats, and he dies, the wife shall not be endowed, because as to her the custom is extinct. 2 Sid. 19 Mich. 1657. obiter,

(H. d) Forfeiture. What shall be a Determination of the Copyhold Estate by Forfeiture.

Godb. 175. pl. 241. Meers v. Ridout S. C. but not exactly S. P.

1. **T**HERE was a tenant for life of a copyhold. The lord granted the reversion of a copyhold after the determination of the particular estate to another for 20 years. Afterwards the copyholder, who was tenant for life, by deed made a lease for life of his copyhold, and made livery, which was a forfeiture of his copyhold estate. It was the opinion of the Justices in that case, that this act of the tenant for life was not a determination or an extinguishment of the copyhold; for although it was a determination of the particular estate of the copyholder, and that he in the remainder might enter; yet the land remained copyhold as it was before. Supplement to Co. Comp. Cop. 73. f. 8. cites Pasch. 8 Jac. in C. B. Moor v. Rideval.

[161]

2. When a copyholder makes feoffment, or does any other act which was utterly inconsistent with his estate, there the copyhold is absolutely determined, and advantage of it may be taken

taken of it at any time; otherwise in case of a *lease for years*, for the copyhold remains a copyhold notwithstanding such lease; otherwise of *lease for life*; but if he will accept a *lease for years from another* it is a determination of his estate; per Treby Ch. J. Lutw. 803. Trin. 10 W. 3. in Case of East-court v. Weekes.

[I. d] What shall be a *sufficient Lord to give Licence*. This in Roll is letter (K) in fol. 511.

[1. A *Lord at will* of a copyhold manor cannot give licence to a copyhold tenant to make a lease for years, though he may grant a copyhold for life according to the custom. Hill. 8 Ja. B. between *Pettis and Debans*, per Curiam.] The lord cannot give licence to make a lease for a longer time in the tenancy than

he has in the feignory. 2 Brownl. 40. Hill. 8 Jac. C. B. *Petty v. Evans*, S. C. — Gilb. Treat. of Ten. 282. cites S. C. & S. P. for he cannot discharge the lord's interest any farther than his own interest in the manor goes, and therefore if the lord, that gives the licence has but a particular interest in the manor, the licence is determined upon the determination of the lord's interest.

[2. If a *lord for life* of a copyhold manor gives licence to a tenant to make a lease for years, this lease shall not continue longer than the life of the lord. H. 8 Jac. B. between *Pettis and Debans*, per Curiam. 2 Brownl. 40. *Petty v. Evans*, S. C. & S. P. accordingly, though the

copyholder be of inheritance; for the inheritance of the lord is bound by that.

(K. d) Actions in general.

What Action at Law or Suits in Equity one Tenant may have against another in respect of the same Land.

Tenant for Life and Reversion or Remainder.

1. [N 13 R. 2. Fitz. Judgment 7. it is said, that the heir who is inheritable to the copy lands by custom, may recover the same by *plaint in the court of the lord, in the nature of an assise of mortdancestor*, but he shall not have an assise of *novel disseisin*; and 15 H. 8. Tenant by Copy 24. the heir of a copyholder, tenant in tail, shall recover the lands in a *formedon in the descender*. Supplement to Co. Comp. Cop. 78. f. 12. cites 13 R. 2. Fitz. Judgment 7. & 17 H. 8. Tenant by Copy, 24.

2. A copyholder made a lease for years by indenture warranted by the custom; it was adjudged, that the lessees should maintain *ejectione firmæ*, although it was objected, that if it were so, then if the plaintiff doth recover, he should have habere facias possessionem, and then copyholds should be ordered by the laws of the land, Arg. cites Mich. 14 & 15 Eliz. Le. 4. pl. 8. Anon. Supplement o. C. o. Comp. Cop. 85. f. 20. cites S. C. [162]

3. *Copyholder makes a lease for years according to the custom*, this is an estate upon which an *ejectment* is maintainable. Mo. 128. pl. 276. [per Cur. as it seems] cites 15 Eliz. C. B. and says it was so adjudged in C. B. 4 H. 6.

Supplement
to Co.
Comp Cop.
75. f. 10.
cites S. C.
— Gilb.
Treat. of
Ten. 269.
cites S. C.
and says the

4. If a *copyholder dies*, and his heir enters, and leases it to J. S. who enters and takes the profits, and is ejected, he may bring an *ejectione firmæ* without his lessor's being admitted, or presentment that he is heir, no court being held for 30 years, but when a court was held he came and prayed admittance, which the steward denied. Le. 100. pl. 128. Pasch. 30 Eliz. B. R. Rumney v. Eves.

reason seems to be, because the law casts the estate upon him by descent, and so enables him to make a lease, lest otherwise, there being no court held in a great while, he should lose the profits of the lands, and so the law casts the estate upon him, and helps out the defect of an admission, but yet only pro tempore, and therefore the heir must be admitted; for an estate at will is not in itself descendible, therefore where the heir is guilty of a supine negligence, the reason, for the law's casting the estate upon him, ceases, and it will reckon no estate in him, and consequently he cannot demise.

4 Le. 30.
pl. 84. S. C.
in toridem
verbis.

5. A *copyholder of inheritance of a manor in the hands of the king is ousted*. It was held in such case, that he has not gained any estate so as he may make a lease for years upon which his lessee may maintain *ejectment*, but he has only a possession against all strangers. 3 Le. 221. pl. 294. Pasch. 30 Eliz. B. R. Anderson v. Hayward.

Supplement
to Co. Comp.
Cop. 86.
f. 20: cites
S C ac-
cordingly.
— Gilb.
Treat. of
Ten. 199.
cites S. C. & S. P. accordingly,

6. *Lessee of a copyholder for a year shall maintain an ejectment*, for since his term is warranted by law by force of the general custom of the realm, it is reasonable, that if he be ejected he shall have an *ejectment*; resolved. 4 Rep. 26. a. b. Trin. 30 Eliz. B. R. the first Resolution in Case of Melwich v. Luter.

remedy in case he be ousted; and says, that so it is if the lord gives licence to make a lease, the lessee shall have an *ejectment*, and cites Cro. E. 461. [pl. 8. Hill. 38 Eliz. B. R. Haddon v. Arrowsmith,]

Cro. E. 462.
pl. 8. Arg.
S. P. said to
have been
adjudged.
— Cro.
C. 304.
Pasch. 9.

7. If *copyholder makes a lease which is not according to the custom of the manor*, yet this lease is good, so that the lessee may maintain an *ejectione firmæ*, for between the lessor and lessee, and all other except the lord of the manor, the lease is good. Owen 17. Trin. 36. Eliz. B. R. Downingham's Case.

Car B. R. the court cited Hill. 18 Jac. the case of STREET v. VERRAL, where it was adjudged a good lease against all but the lord. — Ibid. 305. cites S. C. and says it was so resolved 28 Eliz. B. R. and that the book of 12 E. 4. 13. is direct in the point.

Supplement
to Co.
Comp. Cop.
85. f. 20.
cites S. C.
according-
ly.

8. *Ejectione firmæ*. The parties were at issue; it appeared upon the evidence, that the plaintiff was lessee for 3 years of a copyhold, and the custom of the manor was proved to be, that a copyholder might let the land for 3 years. It was the opinion of Anderson Ch. J. that the lessee of a copyholder cannot maintain *ejectione firmæ*, but if he might, he ought to shew his lessor's estate, and his licence, or a special custom to warrant he

the lease. Cro. E. 469. pl. 20. Hill. 38 Eliz. B. R. Wells v. Partridge.

9. *Lessee of a copyholder cannot maintain ejectment at common law, per tot. Cur. præter Beaumont; for the nature of copyhold land is to be recovered only in the copyhold court by plaint according to his case, and the law takes no countenance of them but as tenants at will; and though the customs are pleadable and allowable at our law, yet no action can be maintained for them at common law, nor by any writ of the queen's.* Cro. E. 483. pl. 19. Trin. 38 Eliz. C. B. Stephens v. Elliot.

Gilb. Treat. of Ten. 199. cites S. C. & S. P. and says, that this is generally so, but [163] then must be understood of a lease without licence, and for more

than a year; for by the licence the lord gives up his power of adjudging about the lessee's estate, because when he has given licence, it seems that he has an estate at common law, though of copyhold lands.

10. A copyholder by licence from the lord to let his land for 21 years leased it to the plaintiff for 3 years, who entered, and being ejected brought an ejectment; all the barons held clearly, that the ejectment was well brought, for the lease is good between the parties, and all others but the lord, and in this case it is good against him by reason of the licence, and that the making a lease for 3 years is warranted by the licence for 21 years, and this action well maintainable thereupon at the common law. Cro. E. 535. pl. 68. Mich. 38 & 39 Eliz. in the Exchequer. Goodwin v. Longhurst.

Gilb. Treat. of Ten. 200. cites S. C.

11. If a copyholder makes a lease for years his lessee shall maintain an ejectment; adjudged. Mo. 539. pl. 709. Hill. 39 Eliz. B. R. Stoper v. Gibson.

If the lease is warranted by the custom, the lessee may

maintain ejectment, per all the justices; and Popham held, that he may maintain it, though the lease is not warranted by the custom. Mo. 569. pl. 776. Sprakes's Case.

12. A copyholder made a lease for a year, excepting one day, which was warranted by the custom. The lessee being ousted brought ejectment; adjudged that it well lies; and per Popham, if there was no custom, yet it should be good against all but him who had the inheritance and the freehold. Cro. E. 676. pl. 4. Trin. 41 Eliz. B. R. Sparkes's Case.

Mo. 569. pl. 776. S. C. accordingly. — Gilb. Treat. of Ten. 201. after taking notice of the several

cases for and against the lessee's maintaining an ejectment says, that all those cases, that are for declaring upon the custom, are against it; and that this opinion is supported by these reasons, that when a copyholder makes a lease he determines his will, and therefore the lord may enter, and if the lessee enters he is a disseisor, and Lord Coke's saying that a lessee for a year may have ejectment excludes all others from having it.

13. If a copyhold be granted for years by copy, such copyholder shall not maintain ejectment at the common law; per Popham. Cro. E. 676. pl. 4. Trin. 41 Eliz. B. R. in Sparks's Case,

Mo. 569. pl. 776. Sprakes's Case, S. C. but S. P.

does not appear.

14. Ejectment does not lie of a copyhold unless the plaintiff declares of the custom, the lease, and the ejectment. Mo. 679. pl. 927. Hill. 45 Eliz. C. B. Gregory v. Harrison.

Gilb. Treat. of Ten. 200. S. P. as to the custom, but

but says that some hold, that this must come on the other side, and that in this diversity of opinions it will be good to see what is plain, that so we may more easily determine and know what is uncertain; and first, it seems plain that a lessee for a year of copyhold land may have an ejectione firmæ, and it is very plain also, that where a copyholder may make a lease by custom, such lessee may have a lease by custom, and such lessee may have ejectment. But the question is, whether such lessee need mention the custom in his count? It seems also to be plain, that lessee by licence may maintain the action for the reason before; but the main doubt of the case is, whether a lessee without licence may maintain ejectment upon that reason, that the lease is good against every body but the lord?

Supplement
to Co.
Comp. Cop.
86, l. 20.
cites S. C.

15. An action brought upon an *ejectment*; the plaintiff was nonsuit upon his own evidence, because he declared upon a *demise made for three years, and it was confessed by the plaintiff, that the lands were copyhold lands, and that the plaintiff had not licence to demise for 3 years, neither could he prove that by any custom he could demise them for 3 years without a licence*, and so the lessor was taken for a disseisor, by the opinion of the Court. Brownl. 133, Trin. 9 Jac. Cramporn v. Freshwater.

[164]

16. Where copyholders ought to *present a surrender, and will not* at the next court, caveat emptor, which means that he has no remedy. Arg. Roll. R. 125. pl. 7. Hill. 12 Jac. cites 5. Rep. 84. Periman's Case.

17. If the custom is, that the surrender shall be to one of the tenants of the manor and a *tenant will not take a surrender*, no action lies; per Coke and Haughton. Roll. Rep. 126. pl. 7. Hill. 12 Jac. B. R. Ford v. Hoskins.

Chan. Cases
271. S. C.
but nothing
appears
there as to
point of
waste.

18. A. seised in fee of copyhold lands surrendered them to the use of B. on condition that C. should enjoy the same for life. A. died. C. entered and *committed waste* on the lands and the timber. On a bill by B. to stay waste, it was decreed, that no relief could be for waste done, it appearing that C. *tenant for life, had paid off 100l. mortgage on the premises*; but an injunction against him to stay all *future waste*, and B. to pay 2 thirds of the 100l. and C. the other 3d. Fin. R. 220. Trin. 27 Car. 2. Cornish v. New.

19. If *tenant for life does waste*, as in pulling down part of the house, and carrying away the stones and the timber, an action on the *case* lies for the remainder-man in fee of the copyhold, *ad exhæredationem* of the plaintiff; per Pemberton Ch. J. and Levinz J. against Windham and Charlton Justices. 3 Lev. 130. Trin. 35 Car. 2. C. B. Jefferson v. Jefferson.

20. A *writ of aiel* was brought in the court of a copyhold manor to avoid an estate, for that there *had been no surrender, a possession having gone with the defendant there for 45 years*. The Court granted a *perpetual injunction*, for that after so long a time a surrender should be presumed, and the rolls may be lost, and no reason the estate should be avoided after so long a possession, 2 Freem. Rep. 106. pl. 117. Mich. 1689. Knight v. Adamson.

Id. Raym.
Rep. 43
Brittel v.
Bade, S. C.

21. *Ejectment* lies of copyhold lands, but a *writ of right will not*, by reason of the baseness of the nature of copyholds. 1 Salk. 185, pl. 4. 7 W. & M. in C. B. Brittle v. Dade,

(L. d)

(L. d) What Suits or Actions lie for the Tenant against the Lord.

1. IN trespass, it was moved that if the lord *ousts his tenant* at will according to the custom of the manor, what remedy has he? Danby Ch. J. of C. B. thought that he should have remedy against the lord; for the lord has done him a tort by the ouster, because the tenant is as well inheritable to have the land to him and his heirs, according to the custom of the manor, as any man is to have land at the common law, because he pays a fine to the lord when he enters; Littleton said, he saw a *subpœna* brought by such a tenant against the lord, and it was held by all the Justices, that he should recover nothing, because the entry of the lord was adjudged lawful, because the tenant is tenant at will, and writ of false judgment, nor writ of right does not lie; but per Danby, he shall have writ of right against the lord, and the lord cannot justify his entry into the land. Br. Tenant per Copie &c. pl. 10. cites 7 E. 4. 19.

2. *Trespass of a close and house broken*, the defendant said, that the place where &c. is a house and 20 acres of land, which, at the time of the trespass, and before, was parcel of the Manor of Dale, and that R. lord of the manor, leased to him for life, by copy, according to the custom of the manor, by which he was seised in dominico suo ut de libero tenemento, according to the custom of the manor aforesaid, and gave colour; per Bridges. he shall not say de libero tenemento; per Brian, he shall, according to the custom &c. ut supra, quod Cur. concessit. Per Bridges, he is only tenant at will, and therefore the lord may put him out; but per Brian, No; for if the lord put him out, as long as he does the customs and services he shall have trespass; per Catesby, the tenant shall prescribe against his lord, and for this cause the plaintiff demurred upon the plea of the defendant; quære, for no more was said thereof. Br. Tenant per copie, pl. 13. cites 21 E. 4. 80. [165]

3. The lord cannot at his pleasure put out the lawful copyholder, and if he do the copyholder may have an action of trespass against him, for though he is tenens ad voluntatem domini, yet it is secundum consuetudinem maner. C. Litt. 60. b.

4. An action of trespass lies against the lord where he cuts down trees when by custom they belong to the tenant, because this is a mere personal action, and damages only are to be recovered. Co. Comp. Cop. 60. f. 51.

5. If the lord will not hold a court to admit a tenant, he has no remedy but in Chancery. Cro. J. 368. pl. 1. Pasch. 13 Jac. B. R. Ford v. Hoskins, Cart. 8, S. C. cited. Roll.

per Coke Ch. J. quod fuit concessum, per Cur. in case of Ford v. Hoskins. — a Bull. 336. S. C. and so held per tot. Cur. except Doderidge J. who likewise afterwards changed his opinion. — Sid.

——— Sid. 34. S. P. ——— Mo. 842. pl. 1137. S. C. ——— He was decreed to hold his court D. 264. pl. 38. ——— He is compellable in chancery, per Doderidge J. 2 Roll. R. 274. ——— Adjudged, that action on the case lies not against the lord for refusing to admit a nominee. 2 Bulst. 337. ——— Resolved, that the surrendoror may have action on the case against the lord for not holding a court, and admitting the surrenderee, but the surrendoror cannot. 2 Bulst. 217. cites 26 El. Gallaway's Case. ——— Supplement to Co. Comp. Cop. 70. f. 4. cites S. C.

6. Where there is custom of *frank-bank*, and the lord refuses to admit the widow, but enters upon her, and ousts her, she may make a lease for a year and maintain *ejectment*. Noy 29. Hill. 15 Jac. B. R. Rennington v. Cole.

7. *Writ* shall be directed to the lord of a manor, *commanding him to hold a court*, whereby justice may be done to his tenants. Arg. 2. Roll. R. 107. Trin. 17 Jac. B. R. Anon.

8. The defendant, being lord of several manors, *did refuse to hold courts, and grant admittances &c.* whereupon the copyhold tenants exhibited their bill to be relieved, and it was *decreed*, that the defendant and his heirs should from time to time, as occasion should require, procure courts to be held for the manors, and suffer the plaintiffs and their heirs to make surrenders to such persons, and for such uses, as the copyholders should limit and direct, and that the surrenderees should be admitted accordingly. Nels. Chan. Rep. 12. 6 Car. 1. Moor v. Huntington.

Action will not lie against the lord for not admitting a copyholder;

Arg. Carth. 492. Patch.

11 W. 3. B. R. in Case of Greenvel v. Burnell.

9. If *A. surrenders to the lord ea intentione that he shall grant over the same to J. S.* If the lord will not grant the same. *A. may re-enter*, but *J. S. has no means to enforce the lord to grant the same over to him*, but he may maintain *trespass against the lord if he suffers A. to re-enter*; and this is the opinion at this day. Calth. Reading 61.

[166] (M. d) How Copyholders shall implead, or be Impleaded. And where.

Mo. 410. 659. S. C. accordingly by 3 justices, contra Fenner. But at another day 3 of the justices held the action maintainable, because

the court baron cannot hold plea, nor award execution of 50l. damages, and yet the damages were well assessed there. — Cro. E. 476. pl. 25. S. C. and the whole court held the damages well awarded, and that she might well recover so much there; for as they may hold plea of the land, so also for the damages, as far as the demandant is diminished, and shall be well allowed; fed adjournatur.

1. **DOWER** was recovered in the lord's court) *and 50l. damages*; no action of debt lies at common law for the damages, for on such judgment no writ of error or false judgment lies, but the remedy is in the court of the manor, or in Chancery, and where feme is to be endowed by the custom, (without which there is no dower of copyhold) she shall have all incidents to dower, and shall recover damages by the *statute of Merton De Viduis &c.* and so the recovery of damages in this case lawful though they exceed 40s. 4 Rep. 30. b. pl. 22. Trin. 37 Eliz. Shaw v. Thompson.

2. A copyholder cannot in any action real, or that favours of the realty, or has a dependance upon the realty, implead, or be impleaded in any other court but in the lord's court, for or concerning his copyhold. But in actions that are merely * personal he may sue or be sued at the common law. Co. Comp. Cop. 60. f. 51. * Gilb. Treat. of Ten. 315. S. P. cites Supplement to Co. Comp. Cop. 143.

3. If a copyholder be ousted of his copyhold by a stranger, he cannot implead him by the king's writ, but by plaint in the lord's court, and shall make protestation to prosecute the suit in the nature of an assise of novel disseisin, of an assise of mortdancestor, of a formedon in the descender, reverter, or remainder, or in the nature of any other writ, as his cause shall require, and shall put in pleg. de prosequend. Co. Comp. Cop. 60. f. 51.

4. If a copyholder be ousted by the lord he cannot maintain an assise at the common law, because he wants a frank-tenement, but he may have an action of trespass against him at the common law; for it is against reason, that the lord should be judge where he himself is a party. Co. Comp. Cop. 60. f. 51.

5. If in a plaint in the lord's court touching the title of a copyhold, the lord gives false judgment, he cannot maintain a writ of false judgment, for then he should be restored to a frank-tenement where he lost none. Co. Comp. Cop. 60. f. 51.

6. No copyholder of base tenure in ancient demesne, can maintain a writ of droit close, or a writ of monstraverunt, but tenants of frank-tenour in ancient demesne can. Co. Comp. Cop. 60. f. 51.

7. A copyholder that may cut down timber trees by custom, by licence of the lord makes a lease for years, the lessee cuts down trees; the copyholder shall not have a writ of waste, but shall sue at the lord's court to punish this waste. Co. Comp. Cop. 60. f. 51. Gilb. Treat. of Ten. 315. S. P. cites Co. Comp. Cop.

8. If a feme dowable by custom of a copyhold by plaint in the lord's court, recovers dower and damages, no action of debt lies at the common law for these damages, because the action, though it be in itself personal, yet depends on the realty. Co. Comp. Cop. 60. f. 51.

9. If a stranger cut down trees growing in the copyhold ground, an action of trespass lies at the common law against him. Co. Comp. Cop. 60. f. 51.

10. If a copyholder makes a lease by copy for years, or by deed, with licence, an action of debt lies for the rent reserved upon either lease at the common law; but Lord Coke much doubts whether he can avow for the rent in the one or in the other, any more than cestuy que use, before the statute 27 H. 8. cap. 10. could avow for the rent reserved by him upon a lease for years, and yet he could maintain an action of debt for such a rent, because an action of debt for such a rent is grounded upon the contract. Co. Com. Cop. 60. f. 51. [167]

11. Copy-

Litt. f. 76.
Co. Litt. 60.

11. *Copyholders shall not implead nor be impleaded in the king's courts by the king's writs for their tenements, but shall make our plaint in the lord's court, and make protestation to follow it in the nature of one of the king's writs as formedon, assise &c.* Nor can they have a writ of false judgment, but must sue to the lord by petition in nature of such writ, and therein assign errors. Hawk. Co. Litt. 105.

12. *An erroneous judgment was given in a copyhold court, where the king was lord, and this was in a formedon in remainder, and it was moved, if the party against whom it was given may sue in the Exchequer Chamber by bill, or petition to the king, in the nature of a writ of a false judgment, for the reversal of that judgment, Tanfield seemed that it is proper so to do, for by 13 Rich. 2. if a false judgment be given in a base court, the party grieved ought first to sue to the lord of the manor by petition, to reverse this judgment, and here the king being lord of the manor, it is very proper to sue here in the Exchequer Chamber by petition, for in regard that it concerneth the king's manor, the suit ought not to be in the Chancery, as in case a common person were lord, and for that very cause it was dismissed out of the Chancery, as Serjeant Harris said. Lane 98. Hill. 8 Jac. in Scacc. Edward's Case.*

Gilb. Treat.
of Ten. 292.
cites S. C.
For the
common
law does

13. *Copyhold lands are as the demesnes of the manor, and are the lord's freeholds, and therefore not impleadable but in the lord's court.* Cro. J. 559. pl. 5. Hill. 17 Jac. B. R. Pymnock v. Hilder.

not take notice of such base estates. — If an erroneous judgment be given in the lord's court, it ought to be reversed by petition in chancery, and decreed that it should be. Lane 98. Hill. 8 Jac. in the Exchequer, cited by Tanfield, as PETTISHALL'S CASE, in which himself was counsel, in Lord Bromley's time.

Le. 328.
pl. 463.
S. C. & S. P.
accordingly
per tot. Cur.

14. *Ejectment lies not of a copyhold estate; it lies of a lease made by a copyholder, but not of a demise made by the lord of a copyhold by copy of court roll.* Cro. E. 224. pl. 9. Pasch. 33 Eliz. B. R. Cole v. Wall and Burnell.

— Supplement to Co. Comp. Cop. 86. f. 10. cites S. C. and S. P. agreed. — If a copyholder, without licence makes a lease for one year, or with licence makes a lease for many years and the lessee be ejected, he shall not sue in the lord's court by plaint, but shall have an ejectio firmæ at the common law, because he has not a customary estate by copy, but a warrantable estate by the rules of the common law. Co. Comp. Cop. 60. l. 51.

15. *An ejectment will not lie for a 3d. part of a copyhold tenement in nature of dower, for they ought to levy a plaint in nature of a writ of dower in the manor court, and the homage to sever and set out the same; but if the custom had been for the widow to have the 3d. part, in nature of dower, but in common with the heir, it were then otherwise; per Pemberton Ch. J. at Chelmsford assizes. 2 Show. 184. pl. 188. Hill. 33 and 34 Car. 2. B. R. Chapman v. Sharp.*

Lord Rem.
Rep. 44.
Brittle v.
Bade. S. C.
and S. P. by
Treby Ch.

16. *Copyholds are parcel of the demesnes of the manor, so that if they are triable in the lord's court, the lord might be judge and party; and therefore per Treby Ch. J. jurisdiction of*

of the lord's court extends to lands holden of the manor only, and not to land, parcel of the manor. 1 Salk. 186. pl. 4. 7 W. 3. C. B. Brittle v. Dade.

(*N. d) Actions by the Lord against the Tenant.

1. **A**N *avowry* may be made for rent of a copyholder due to the lord, which is a duty at the common law, and therefore an *avowry* may well be for it; per tot. Cur. Cro. E. 524. pl. 51. + Mich. 38 and 39 Eliz. B. R. the 3d. resolution in Case of Laughter v. Humphries, as 8 R. 2. *Avowry* 86. is.

Gilb. Treat. of Ten. 291. cites S. C. for the lord has an estate at common law in the rent, and not

the customary estate and it is due to him upon the same grounds and reasons in law, as the rent of freehold is. ———+ This is misprinted and should be Hill. 6 R. 2.

2. Where the lord *disfrains* his tenant and he makes *rescous*, and is disseised, yet per Keble, *assise* lies well enough against the tenant without any *regress* made; per Mordant, without possession of the land the *assise* cannot be maintained against the tenant; Keble e contra, and a fortiori, *writ of customs and services* lies against him, because of privity, and he remains tenant in fact to the lord notwithstanding the *disseisin* of the land; quod nota; Kelw. 20. pl. 4.

3. If the lord lets the *rents* of his copyholder be arrear, and if the copyholder surrenders his land, and the surrenderee is admitted, and so a *fine* is due, but before the rent or fine paid he sells the manor to J. S. and his heirs, he has no remedy either in law or equity to recover his rent or fine, because, he has deprived himself by his own act. See Tit. Chancery (P.) pl. 1. and (Q.) pl. 3. Pasch. 10 Car. B. R. Hitcham v. Finch.

Gilb. Treat. of Ten. 291. cites S. C. but says quare; for debt lies for a fine and if it be a duty then

surely the passing away the manor will not make it cease to be such; and quare, why he shall not have debt for the rent due, and whether he has not a freehold in them.

(O. d) What Acts of Parliament shall be construed to extend to Copyholds.

1. **A** Copyhold is within the Statute of Merton, that feme shall recover damages if her baron dies seised; per all the Justices. Mo. 411. pl. 559. Trin. 37 Eliz. in Case of Shaw v. Thomson.

4 Rep. 30. b. pl. 22. S. C. and S. P. held accordingly. ———

S. P. by Yelverton J. Cro. C. 43. ——— Gilb. Treat. of Ten. 171. cites S. P.

2. The Stat. Westm. 2. cap. 4. which gives to the particular tenant a quod ei de forceat, may by a benign interpretation extend to copyholds, because it is beneficial to the copyholder, and not prejudicial to the lord; agreed 3. Rep. 9. Pasch. Eliz. in Scacc. and cites 10 E. 4. 2. b. accordingly.

S. P. by Yelverton J. Cro. C. 43.

3. The

Sav. 67.
S. P. by
Manwood
Ch. Baron.
—S. P.
by Yelver-
ton J. Cro.
C. 43—

Gilb. Treat. of Ten. 171, 178. cites S. C. and says that the Stat. Westm. 2. cap. 3. in all its branches extends to copyholds for the same reasons.

3. The Stat. *Westm. 2. cap. 3.* which gives the same a *cut in vita, & receipt*, may by a benign interpretation extend to the copyholds, because they are beneficial to the copyholder and not prejudicial to the lord; agreed. 3 Rep. 9. a. Pasch. 26 Eliz. in Scacc. and cites 10 E. 4. 2. b.

[169]
Agreed per
tot. Cur.
that this act
does not
extend to
copyholds.
3 Rep. 9.
Pasch. 16.
Eliz. in
Heydon's
Case. —
S. P. by 3
justices,
Arg. Cro.
C. 44. Mich.
a Car. C. B.
—S. P.
by Man-
wood Ch.
B. for if it

4. Copyhold lands are not within the Stat. *Westm. 2. cap. 20. [18.] Executions*; for if a judgment be had in the court of record against a copyholder for debt and damages, although the plaintiff may have execution by fieri facias against his goods, or a capias against his body, yet he *cannot have execution of the moiety of his copyheld lands by elegit*, for that copyhold lands are not within the statute; and so it is, *if a stat. merchant or staple be acknowledged by a copyholder* for the payment of money at a day certain, which is not paid, his copyhold lands are not extendable for the same; and the reason of these cases is, because no persons can come to copyholds but by admittance of the lord, and the lord should thereby lose his fine which is due upon admittance, if the party might have the lands upon extent delivered unto him. Supplement to Co. Comp. Cop. 86, 87. f. 21.

should extend to copyholds, the common law would break the custom. Sav. 66, 67. pl. 138. in Scacc. in Heydon's Case. — Gilb. Treat. of Ten. 173. S. P.

5. [But] *if the tenant by the curtesy, or lessee for years, be of a manor, and copyholds were in his hands by forfeiture or other determination, and he bindeth himself in a statute, and afterwards he demiseth the copyhold again*, the copyhold shall be liable to the statute; but if a copyholder bindeth himself in a statute merchant or staple, his copyhold land shall not be extended upon the said statute, because therein he hath but an estate at will. Supplement to Co. Comp. Cop. 87. f. 21. cites Pasch. 12 Eliz. in C. B. Mo. 94.

Co. Comp.
Cop. 61.
f. 54. S. P.
—Gilb.
Treat. of
Ten. 173.
S. P.

6. The Stat. of *Prerogativa Regis, cap. 9, and 10.* gives the lands of idiots natural to the king, he finding them convenient maintenance out of the profits thereof; but if the *idiot hath copyhold lands descended unto him*, the king shall not have the wardship of those lands therewith, out of the profits thereof to maintain the idiot, because the same would be prejudicial to the lord of the manor, of whom the lands are holden by copy but; yet all alienations made by an idiot of his copyhold lands, after office found, shall be avoided by the king. Supplement to Co. Comp. Cop. 86. f. 21. cites Stat. Prerogat. Reg'. c. 9 and 10. 8 Rep. 170. in Towersson's Case. 4 Rep. 126, 127, 128. in Beverley's Case.

7. The statute of 5 R. 2. of *Departure out of the Realm* extends to copyhold lands. Supplement to Co. Comp. Cop. 88. f. 21.

8. The

8. The Statute of 16 R. 2. *cap.* 5. which makes it a forfeiture of lands, tenements, and hereditaments, to the purchaser of excommunication, bulls &c. in the court of Rome &c. extends not to copyhold, because it would be prejudicial to the lord to have the king so far interested in his copyhold without his consent. Co. Comp. Cop. 61. f. 53.

Gilb. Treat. of Ten. 173. S. P.

9. The Statute of 2 Hen. 5. *cap.* 7. of Hereticks extends not to copyholds, for though the lord of a manor is yearly to receive a benefit in having the lands, after the year and the day, forfeited unto him, yet because the king is a sharer in this forfeiture, therefore lands by copy are not comprehended under the general words; besides, the statute speaks of the king's having annum, diem & vastum of these lands forfeited for heresy, as in lands forfeited for felony, whereby it appears that the meaning of the statute is, that such lands only should be forfeited in which the king by the ordinary course of the law should have annum, diem & vastum if the tenant of them had committed felony, but such lands are not lands by copy; for if a copyholder commits felony, his copyhold is presently forfeited to the lord, therefore copyholds are out of the general purview of this statute. Co. Comp. Cop. 61. f. 53.

10. By the Statute of 1 R. 3. *cap.* 4. it is expressly provided, that a copyholder, having copyhold lands to the yearly value of 26s. and 6d. above all charges, may be impanelled upon a jury as well as he that has 20s. per ann. of freehold land. Co. Comp. Cop. 60. f. 52.

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11. If I levy a fine of my copyhold land, and five years pass, not only the lord is bounden as to his freehold and inheritance, but also the copyholder for his possession; for the intent of the statute of 4 H. 7. was to take away controversies, et litibus finem imponere, and contention may be as well for copyhold as for land at the common law; per Popham Ch. J. Le. 99. pl. 126. Mich. 30 Eliz. Saliard v. Everat.

Supplement to Co. Comp. Cop. 88. f. 21. cites S. C. — Gilb. Treat. of Ten. 173, 174. S. P. it being no ways prejudicial to the tenant or the lord.

12. The Statute of 4 Hen. 7. *cap.* 24. of fines extends to copyholds, for if a copyholder be disseised, and the disseisor levies a fine with proclamations, and 5 years pass without any claim made, this is a bar both to the lord, and to the copyholder. Co. Comp. Cop. 62. f. 55.

13. So if a copyholder makes a feoffment in fee, and the feoffee levies a fine with proclamation, and 5 years pass, the lord is barred; but if the copyholder levies a fine, and 5 years pass, the lord is not barred; for the fine levied (the copyholder having no frank-tenement) is utterly void. Co. Comp. Cop. 62. f. 55.

14. And whereas it has been doubted, that this statute should not extend to copyholds, but the lord should hereby receive grand prejudice, for he should not only lose the fines upon alienations or descents, and the benefits of forfeiture, but should withal be in danger to be barred of his frank-tenement and inheritance; to that my Lord Coke answers,

if the lord receive any such prejudice, it is through his own default for not making claim, for *in regard of the privy in estate that is between him and the copyholder, he may make claim as well as the copyholder himself*, et vigilantibus, non dormientibus, jura subveniunt. Co. Comp. Cop. 62. f. 55.

S. C. cited
Arg. 4 Mod.
85. that
the words
in the statute

15. Copyhold lands are not within the Stat. of 11 H. 7. cap. 20. 2 Sid. 73. Pasch. 1658. B. R. Harrington v. Smith.

I

are manors, lands, tenements, and other hereditaments.

The statute
27 H. 8 cap.
10. for exe-
cuting uses
to the pos-
session, ex-
tends not to
copyholds,
which is plain from common experience; for when a copyholder surrenders to the use of another the possession is not executed to the use; for the surrenderee has nothing till admittance; for it was not the intent of the statute to execute the possession to the use of copyhold lands, for then a tenant would be introduced without the lord's consent. Gilb. Treat. of Ten. 170.

16. If a man bargains and sells copyhold lands, it seems nothing passes but a use; for copyholds *are out of the Statute of Uses*, and therefore such a bargainor may afterwards surrender it to the use of the bargainee, and no estate passing, it seems to me to be no forfeiture. Gilb. Treat. of Ten. 239.

S. P. by 3
justices,
obiter. Cro.
C. 44. Mich.
2 Car. C. B.
for it would
tend to the
lord's pre-
judice.

17. The Statute 27 H. 8. cap. 10. of *Uses* touches not copyholds, because the transmutation of possession by the sole operation of the statute without allowance of the lord and of the tenant and the branch of the same statute, which speaks of *jointures*, touches not copyholds; because dowers of copyholds are warranted by special custom only, and not by the common law, or by the general custom. Co. Comp. Cop. 61. f. 54.

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18. The branch of the Statute 27 H. 8. cap. 10. as to *Jointures* does not extend to copyholds, so that if a jointure be made to a woman in copyhold, that will be no bar to her dower; the reason is, because the words of the proviso being general and inductive of a new law, to bar women of their dower, where they were not barred by the common law, there is no reason to extend them, since an estate in copyhold lands is very disadvantageous to the woman, who must pay a fine to be admitted, which she may not be able to do, and thereby will commit a forfeiture; besides, a woman is not dowable of common right of copyhold lands, and so it seems to be out of the regard of the statute, and Lord Coke defines a jointure to be a competent livelihood of freehold, so that it must be an estate of freehold. Gilb. Treat. of Ten. 170; 171.

S. P. by 3
justices
obiter. Cro.
C. 44 Mich.
2 Car. C. B.
—Gilb.
Treat. of
Ten. 172,
173. S. P.
because the acts provide that it shall be done by writ of partition, and copyhold lands are not impleadable at common law.

19. The Statute of 31 H. 8. cap. 1. and 32 H. 8. cap. 32. by which jointenants and tenants in common are compellable *to make partition by a writ de partitione facienda*, as copartners at the common law, touch not copyholds because this alteration of the tenure without the lord's consent may found to the prejudice of the lord. Co. Comp. Cop. 61. f. 54.

20. Debt for the fine of a copyholder is not within the Statute of Limitations. 2 Keb. 536. pl. 56. Trin. 21 Car. 2. B. R. per Cur. in Case of Hodsdon v. Harris.

Gilb. Treat. of Ten. 165. 166. cites S. C.

21. The testator was seised of several rents issuing both out of freehold and copyhold lands, and died seised; after his death his executor brought debt for the arrears as well of the copyhold as of the freehold rents due in the life-time of his testator, but the Court held, that the Statute 32 H. 8. did not extend to arrears of copyhold rents but only to the rents out of free land. Yelv. 135. Mich. 6 Jac. Appleton v. Bailly.

Brownl. 108. S. C. but it seems only a translation of Yelv. — Gilb. Treat. of Ten. 174. cites the Supplement to Co. Comp. Cop. 87. f. 21. cites S. C. and leaves it a quere; for the case was not resolved.

ment to Lord Coke's Treatise of copyholds, where it is said, that this act extends not to copyholds, and that to prove this a case was cited there out of a Le. 109. Sands v. Hempton, which see, with Lord Ch. Gilbert's Remarks at [Q] pl. 4.

22. Copyholder in fee by licence made a lease for 21 years by indenture, and the lessee covenanted for himself, his executor, and assigns, to erect a pale about such a close, and lay 40 load of dung on land every year, and to repair the buildings; afterwards the lessor surrendered his lands to the use of the plaintiff and his heirs, who was admitted, and brought an action of covenant against the lessee for not performing these covenants; and the question was, whether a copyholder that comes in by surrender of the lessor, be such an assignee as might maintain this action by the common law, or by the Statute 32 H. 8. [cap. 34. of Conditions] as may maintain an action of debt or covenant as an assignee, where the covenant is made by express words between the lessor and lessee, their heirs and assigns; sed adjournatur. Cro. C. 24. pl. 17. Mich. 1 Car. C. B. Platt v. Plummer.

Supplement to Co. Comp. Cop. 87. f. 21. cites S. C. and leaves it a quere; for the case was not resolved. — Keb. 357. pl. 4. Mich. 146. Car. 2. B. R. in case of Baker v. Berisford, the court held, that an assignee of a copy-

holder is within the statute to have an action of covenant; per Cur. the surrenderee of a copyhold reversion may bring debt or covenant against the lessee within the equity of the 32 H. 8. cap. 3. for it is a remedial law, and no prejudice can arise to the lord, and whether he is in the per or in the post is not material, for a bargainee may maintain covenant within this statute, and yet no doubt but he is in the post, and Yelv. 222. was a hasty resolution, and Hob. 178. only an extrajudicial opinion; judgment for the plaintiff; note, the words of the act are, no person being a grantee or assignee of any reversion, 1 Salk. 185. pl. 2. Mich. 3 W. & M. in B. R. Glover v. Cope. — Grantee of reversions of copyholds shall not take advantage of a condition broken, by the 32 H. 8. nor by the common law (of covenants they may, Keb. 350. Cro. C. 24. 25. tamen quere upon Yelv. 135.) For then by entry he might come in to be tenant to the lord without admittance, and though he in the reversion may enter by the common [172] law, yet he was tenant before; the act gives remedy to assignees, which he is not properly who comes in by surrender; when a copyholder enters for a condition broken, he is in statu quo prius, and therefore shall pay no fine; and if the grantee of the reversion might enter by force of the statute, he would be in the same place as his grantor, and so would be in as tenant, and yet pay no fine. Gilb. Treat. of Ten. 168, 169.

23. A copyholder in fee by licence made a lease for years, rendering rent, on condition to re-enter; and the copyholder surrendered to J. S. in fee, who demanded the rent on the land, which not being paid he entered on the lessee; held, that the entry of J. S. is not lawful; for copyhold land is not within the Statute 32 H. 8. cap. 34 of Conditions, nor J. S. such an assignee as the statute intends; for he is in only by the custom, which does not extend to such collateral things,

Cro. J. 305. pl. 7. Beal v. Brasier. S. C. Williams & Yelverton, (absente Fleming) held that the reversioner by way of sur-

render &c. things, and he is not privy to the lease, but may plead his estate immediately under the lord. Yelv. 222. Trin. 10 Jac. B. R. Brasier v. Beale.

neither by the common law, nor by the statute and judgment accordingly. — Brownl. 149. S. C. seems only a translation of Yelv. — This case is denied, and called a hasty resolution. 1 Salk. 185. pl. 2. Mich. 3. W. & M. in B. R. in case of Glover v. Cope. — S. C. cited Supplement to Co. Comp. Cop. 87. f. 21. accordingly. — Hob. 178 at the end of pl. 203. Hobart Ch. J. was of opinion the copyholds are not within the statute of conditions. — S. P. by 3 justices obiter Cro. C. 44. Mich. 2 Car., C. B.

And per Holt Ch. J. if copyholders were enabled by custom to demise, it is reasonable to conclude,

24. A copyholder is within the equity of the Statute of 32 H. 8. cap. 34. whereby grantees of reversions have like advantages against lessees by entry for non-payment of rent, as grantors or lessors themselves might have; though copyholders are not within this statute as to entry for condition, yet an action of covenant lies; Arg. Skin. 297. Mich. 3 W. & M. in B. R. Glover v. Cope.

that they may covenant and make conditions of re-entry and other provisions common in leases. Skin. 298. — Adjudged that covenant lies. Ibid. 307. Glover v. Cope. — 3 Lev. 326. S. C. adjudged. — 4 Rep. 80. S. C. adjudged. — 1 Salk. 185. pl. 2. S. C. and per Cur. the surrenderer of a copyhold reversion may bring debt or covenant against the lessee within the equity of the 32 H. 8. cap. 3. for it is a remedial law, and no prejudice can arise to the lord, and whether he is in the per or in the post is not material, for a bargainee may maintain covenant within this statute, and yet no doubt but he is in post. and Yelv. 222. was a hasty resolution, and Hob. 178. an extrajudicial opinion; judgment for the plaintiff. Note, the words of the act are (no person being a grantee or assignee of any person). — Show. 284. S. C. adjudged.

4 Rep. 23. pl. 4. S. C. Fasch. 35 Eliz. B. R. and that neither she nor her heir shall be put to sue her cui in vita.

25. Baron seised of copyhold of inheritance in right of his feme surrendered it without his feme to the use of a stranger, who was admitted, and surrendered to the use of another; all the Justices held that this is not within the letter, nor the equity of the Statute 32 H. 8. which gives entry to the feme and her heirs against the discontinuance of the baron. Mo. 596. pl. 813. Bullock v. Dibley.

S. P. by 3 justices obiter. Cro. C. 44. Mich. 2 Car. C. B. — Gilb. Treat. of Ten. 166. cites S. C. For the words are *that no fine, feoffment, or any other act or acts &c. of the wife's inheritance or freehold*, which words plainly mean *nothing but a common law estate, and the common law way of conveying*, and if the equity of the act should be construed to extend to copyholds by the entry of the party, there would be a tenant without the assent or admittance of the lord, neither doth the other part of the act concerning leases to be made by the tenant in tail, or husbands of lands in right of the wives, extend to copyholds, for it only extends to those lands that are grantable by deed, and yet it was adjudged, that a grant by deed of copyhold lands by a dean and chapter should not be avoided by the successor by 13 Eliz. cap. 10 in the dean and chapter of Worcester's Case, 6 Rep. 37. and so says, the question will be, why copyhold lands should not be within the 32 H. 8. as well as the 13 Eliz. cap. 10. if the 32 H. 8. doth not extend to copyhold land, then a bishop solely cannot make a grant by copy to bind his successor; Lord Coke says, that a grant by copy in fee, or in tail, for life or years, is a sufficient demise within the act 32 H. 8. All those books may be thus reconciled though in truth they are not contrary to one another. When a man is seised in fee of lands in right of his church or wife, or his tenant in tail in his own right, and some of his lands have been granted by copy for the space &c. this is a sufficient demise within the act, to warrant his demise of them so as to bind the heir or successor; but where a man is himself tenant in tail of copyhold lands, or is seised [173] in right of his church or wife, where he can make no lease to bind by force of the 32 H. 8. because they are not to be made by surrender by force of that act, but by deed indented; and though by licence of the lord a lease of copyhold be demised by deed indented, yet the estate is not originally so grantable, to which only the statute extends, and therefore though copyhold lands have been granted, if they come into the lord's hands, this grant by copy may be a sufficient demise within the act, to warrant his letting them again by deed according to the act, yet it seems he cannot grant them again by copy, for the act requires that leases be made by indenture; and

and it is observable in the DEAN AND CHAPTER OF WORCESTER'S CASE, though the lands were copyholds, yet when they came into their hands they were demised by deed indented, which demise was warranted by the act upon the former grant by copy; now then, if the 32 H. 8. doth not enable grants by copy, it is a great question to me, whether the 13 Eliz. doth restrain them; for all leases made according to the exception of the restraining act must pursue the qualifications of the enabling act, and consequently must be made by deed, and then if grants by copy be left as they were at common law, ecclesiastical persons may grant lands by copy in fee with the consent of these persons whose consent is required to bind their successors; I mean, if they have copyhold lands in fee, they may grant them by surrender to another, not that if they are lords, and they escheat, they may grant them in fee, for upon the escheat they free themselves in their hands, and so within the act. — Gilb. Treat. of Ten. 172. cites Cro. C. 43. and says, that it was said by Yelverton Arguendo, that the 32 H. 8. cap. 8. which gives an entry instead of the cui in vita, extends to copyhold lands, for the act was made to redress a wrong, and it is no prejudice to the lord or tenant, that the wife shall enter, and the general words of the act that give a cui in vita, have been allowed to extend to copyholds; the words of the statute 32 H. 8. are, being the inheritance or freehold of his wife; so if this act does in this branch extend to copyhold lands, as it seems to me it does, then one and the same act of parliament, in one part of it, will extend by general words to copyhold, and the other not, for the first part of the act of leases to be made by tenant in tail extends not to copyhold lands.

26. Copyholds are within the *Statute of Limitations*, per tot. Cur. Mo. 411. pl. 559. Trin. 37 Eliz. in Case of Shaw v. Thompson. Gilb. Treat. of Ten. 165. cites S. C. for that is an

act made for the preservation of the publick quiet, and no way tending to the prejudice of the lord or tenant. And actions concerning copyholds are as fully and plainly within the words of the act of parliament as any other actions are, and so there is no reason to exclude them from the meaning.

27. The Statute of 32 H. 8. cap. 9. of *Buying pretended Titles* extends to copyhold lands. Supplement to Co. Comp. Cop. 88. f. 21.

28. If one that has a pretended right or title to copyhold land bargains and sells it to another, this is within the Statute 32 H. 8. cap. 9. of *Maintenance &c.* the words whereof are, that if any bargain, buy, or sell &c. any right or title in or to any lands or tenements &c. which words (any Right or Title) extend to all manner of rights or titles, and by consequence, to copyhold lands; per Wray Ch. J. 4 Rep. 26. a. Pasch. 31 Eliz. B. R. in Case of Kite v. Quinton. S. P. said to have have been agreed a Brownl. 134 — Co. Litt. 369. B. S. F. cites S. C. — Gilb. Treat. of Ten. 172. S. P. and

the act being to suppress wrong, it is within the equity of it, neither lord nor tenant being prejudiced thereby.

29. Action of debt doth not lie for arrears of copyhold rent, but only rents of freeholds, and the Statute 32 H. 8. extends not to them. Yelv. 135. Mich. 6 Jac. B. R. Appleton v. Bailly. Brownl. 102. Appleton v. Bailly S. C. & S. P.

30. By the Statute of 1 E. 6. cap. 14. it is expressly provided, that upon the dissolution of abbeys and monasteries copyholds should continue as they did before the statute and should fall into the king's hands. Co. Comp. Cop. 60. f. 52.

31. By the Statute 1 Mar. cap. 12. it is expressly provided, that if any copyholder, being yeoman, artificer, husbandman, or labourer, and being of the age of 18 or more, under the age of 60, not sick, impotent, lame, maimed, nor having any just or reasonable cause of excuse, upon request made by any man in authority, refuses to aid justices in suppressing of riotous persons, that

that then he shall immediately forfeit his copyhold to the lord of whom it is held, during the copyholder's natural life, Co. Comp. Cop. 60. f. 52.

Supplement to Co. Comp. Cop. 88. f. 21. S.P.—Gilb. Treat. of Ten. 173. S. P.

*32 By the Statute of 5 *Eliz. cap. 14.* it is expressly provided, that the *forging of a court roll*, to the intent to defraud a copyholder, shall be as well punishable as forging any other charter, deed, or writing sealed, whereby to defeat a copyholder or freeholder, Co. Comp. Cop. 6c. f. 52.

Supplement to Co. Comp. Cop. 87. f. 21. cites S. C. —Gilb. Treat. of Ten. 176.

33. The Statute of 13 *Eliz. cap. 4. of Auditors and Receivers* of the Queen doth not extend to copyholds, and it should be a great prejudice to the lords of such copyholds, that the queen should have the land; per Walmfley Le. 98. pl. 126. Mich. 30 *Eliz.* in Case of Saliard v. Everet.

says this is a reasonable opinion; for power is given by that act to make sale by her letters patents, which should be a very great prejudice to the lord.

See pl. 25. Bullock v. Dibley and the notes there as to comparing this statute of 13 *Eliz.* 10 with the statute of 32 H. 8. cap. 38.

34. The *Dean and Chapter* of W. the 24 *Eliz. demised to G. a copyholder for life, the same copyhold lands for the lives of A, B. and C. and the survivor of them.* The dean died. The successor dean and chapter entered. Resolved that the act of 13 *Eliz. cap. 10.* does not avoid this lease if the accustomed yearly rent be reserved, or more. 6 Rep. 37. b. 38. a. Trin. 3 Jac. B. R. The Dean and Chapter of Worcester's Case.

Gilb. Treat. of Ten. 169. S. P. and that copyhold lands are within the statutes of Bankrupts; because the statute 13 *Eliz.* expressly mentions them, and though the other statutes do not, yet they being made for further remedy in the matter aforesaid, were not to be expounded by the former, especially since that has taken care that no prejudice shall happen to the lord.

35. By the Statute 13 *Eliz. cap. 7.* it is expressly provided, that the copyhold land, as well as the freehold land, of a *bankrupt*, shall be sold for the satisfying of the creditor. Co. Comp. Cop. 61. f. 52.

Cro. C. 548. pl. 2. S. C. & S. P. agreed by the justices — Jo. 437. pl. 3. S. C. adjudged. — Mar. 36. pl. 67. S. P. agreed by all in S. C. pl. 67. Trin. 15 Car. and so by all the books it

36. It was resolved by all the Justices, that copyhold is within the Statutes of 13 *Eliz.* & 1 *Jac.* [concerning Bankrupts] because it is no prejudice to the lord, for that there ought to be a composition with the lord, and the vendee of the lands, and although the sale is and ought to be by indenture, yet the vendee ought to be admitted by the lord. 2dly. The words of the Statute of 13 *Eliz.* expressly are, That the commissioners shall dispose of lands as well copy as free, and the said statutes shall be construed most beneficially for creditors, id est suum cuique tribuere: Supplement to Co. Comp. Cop. 88. f. 21. cites Trin. 15 Jac. [Car.] in B. R. Crisp v. Prat.

seems misprinted in the supplement (Jac.) for [Car.] — S. C. cited by the chief baron as objected that copyhold lands are within the statutes of 1 Jac. and 21 Jac. by reason of the words lands, tenements, and hereditaments, and said, that those words do not make the reason, but the reason is, because copyhold estates are expressly mentioned, but the reason was, because copyhold

copyholds are expressly mentioned in the statute 13 *Eliz. concerning bankrupts*, and the statute 11 Jac. being subsequent and explanatory, and a very beneficial law, therefore copyholds have been adjudged to be within those subsequent laws; besides, the lord of the manor, in the case of a bankrupt copyholder, can be at no prejudice, because the assignee of the commissioners is to be admitted, and to pay his fine to him, and in case of forfeiture by attainer the lord shall have the actual possession of the copyhold, by way of escheat after the death of the copyholder, and this pro defectu hæredis, because his blood is corrupted by the attainer; but it may be a question, who shall have the profits during his life. Hard. 435, 436. — Upon the statute of 13 *Eliz. cap. 7.* which empowers the commissioners of bankrupts to sell the lands &c. it has been held, that they could not sell copyholds if that law had not given them power by express words, viz. to sell as well copy as free land, and so are several acts of parliament made to give *forfeitures of lands, tenements, or other hereditaments &c.* which words do not extend to copyholds but only to inheritances at common law. And the reason is because copyhold lands at the time of making 13 *Eliz. cap. 7.* and other acts, and long after, were in no esteem of the law; for the tenants of those lands held them in villeinage, or at best were but tenants at will, and so not within the provision or care of acts of parliament. And even at [175] this day their estates are held only at the will of the lord according to custom of the manor; and in many respects this tenant hath a dependance upon the lord, for he can neither alien nor lease his copyhold without licence; and therefore when either is done, it is as well the act of the lord as the tenant. Arg. 4 Mod. 85, 86. Hill. 3 & 4 W. & M. in *B. R.* in case of *Glover v. Cope*.

37. By the Statute 14 *Eliz. cap. 6.* it is expressly provided, that if any of the queen's subjects go *beyond the seas without licence*, that then the queen shall not only take the ordinary profits of the fugitives copyhold land as they arise, but shall let, set, and make grants by copy, and usual wood-sales, and other things, to all intents and purposes, as a tenant pro termino durante vita may do. Co. Comp. Cop. 61. f. 52.

38. The Statute of 14 *Eliz. of Fugitives* extends to copyhold lands. Supplement to Co. Comp. 88. f. 21.

39. Copyholds are not liable to the 20 l. *per month upon the* 29. [28.] *Eliz. for Recusancy*. Ow. 37, Pasch. 13 *Eliz.* Anon.

40. A recusant being convicted for not paying 20 l. a month forfeited by the Statute 29 *Eliz. cap. 5. and other statutes of Recusancy*, a commission issued out of the Exchequer to inquire and seize all his *goods, lands, tenements, and hereditaments, liable to such a seizure*; upon the return of the commission it appeared, that some of the lands returned were copyhold lands; it was a question, if they were within the statute? It was the opinion of the Court, that they were within the equity of the statute; for the words of the statute are, *lands, tenements, and hereditaments*, which are forcible words, and the intention of the statute was, that the queen should have all the goods. and the recusant by the words of the statute was only to have the 3d part of his lands, which is all that the law gives him, and if copyhold lands should not be within the statute, if a recusant who had great possessions only of copyhold lands should go unpunished, it was contrary to the meaning of the makers of the act. Supplement to Co. Comp. Cop. 88. f. 21. cites *Le. 97. Trin. [Mich.] 30 Eliz. in Scacc. Saliard v. Everard.*

Ow. 37. Pasch. 13 *Eliz. S. C.* adjudged after great debate, that copyhold lands are not within the statute, by reason of the prejudice that may thereby come to the lord who has committed no offence, and therefore shall not lose his customs and services. — *Gilb. Treat.*

of Ten. 175. cites *S. C.* and says, it came to be a question, whether the Statute 29 *Eliz. cap. 5.* extended to copyholds? and two seemed of opinion it did, and one took this difference, that when a statute is made to transfer an estate by the name of *lands, tenements, and hereditaments*, copyholds are not within such Statute.

a Inst. 737.
S. P. —
Gilb. Treat.
of Ten. 176.
S. P. and cites same cases.

41. Copyholders are not within the Statute of 31 *Eliz. cap. 7. of Cottages*. Bulst. 50. Mich. 8 Jac. Brocke v. Beare.

Gilb. Treat.
of Ten. 173.
S. P.

42. By the Statute 35 *Eliz. cap. 2.* it is expressly provided, that if any person or persons, being convicted of *recusancy*, repair not home to their usual place of abode, not removing from thence above five miles distance, that then any person or persons thus offending, shall not only forfeit their freehold land to the queen, but withal their copyhold to the lord or lords of whom it is holden. Co. Comp. Cop. 61. f. 52.

a Lutw.
1181. 1190.
S. C. & S. P.
resolved.
— Lord
Raym. Rep.
132, 133.
S. C. cited
as adjudged
for the lord,

43. A copyholder is not *within the 12 Car. 2. [cap. 24.] to dispose the custody of his children*, but the custody shall be to the lord or others, according to the custom of the manor, as to the copyhold lands, for the prejudice which may be to the lord, and for the meanness of the estate. 3 Lev. 395. Pasch. 6 W. & M. in C. B. Clench v. Cudmore.

for the statute extends only to lands and tenement at the common law.

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44. Isaac Pennington was attainted of high treason, by the act 12 *Car. 2. of Regicides*, and was at that time seised of a copyhold, held of the manor of W. of which the defendant was lord. By the said statute the *forfeiture is given to the king of all lands, tenements, and hereditaments &c. which the person attainted had on the 25th day of March, or at any time since 1646*, and that they shall be in the actual possession of the king, without office or inquisition, proviso, that no grants or conveyances, or grants and surrenders by copy &c. had or made before 29 Sept. 1659, by any person attainted &c. shall be impeached &c. the question was, Whether by the general words of this act of parliament, the copyhold lands are included, and so forfeited to the king, and whether the proviso, wherein copyhold lands are mentioned, adds any force to the general words; and per Hale Ch. B. if this estate should be forfeited, the copyhold will be destroyed, and pass by letters patent, and not by surrender, and it would be a hard construction to expound an act of parliament so as to destroy the interest of an innocent person. Hard. 432. 435. Hill 18 & 19 Car. 2. in Scacc. the Duke of York v. Mar- sham.

45. A copyholder committed treason in the murder of King Charles, and afterwards, anno 1655, he surrendered his copyhold into the hands of the lord of the manor, for the use of his children, and died. The children were admitted, anno 1659; the manor was sold to the plaintiff, and anno 12 *Car. 2.* the *regicides* were attainted by act of parliament, by which it was *enacted, that all their estates real, and personal, and other things of that nature, whatsoever they shall be, shall be forfeited to the king*; Charlton J. was of opinion, that this copyhold was given to the king by these general words

words (*other things of that nature whatsoever*) but all the rest of the Court were of opinion, that copyholds were never included in a statute where the lord might have any prejudice, unless expressly named, and for the proviso, it might be satisfied by the copyholds which the traitors might hold in the king's manors, or where they had a manor held of the king, and had made voluntary grants of copyholds and surrenders made subsequent; but it was ordered to attend the king's attorney general, to know if he desired to be heard to the point, et adjournatur. 2 Vent. 38. Pasch. 35 Car. 2. C. B. Lord Cornwallis's Case.

46. Statutes that are *beneficial* to the copyholder and not prejudicial to the lord, may by a benign interpretation be extended to copyhold; as Statute W. 2. cap. 3. which gives *cui in vita and rescisept*, and cap. 4. which gives to the particular tenant *quod ei deforceat*. 3. Rep. 9. 2. Pasch. 26 Eliz. in the Exchequer. Heydon's Case.

47. When an act of parliament *alters the service, tenure, or interest of the land, or other thing in prejudice of the lord, or of the custom of the manor, or of the tenant*, there the general words of an act of parliament shall not extend to copyholds, but when an act is generally made for the public good, and no prejudice may accrue by reason of the alteration of any interest, service, tenure, or custom of the manor, there oftentimes copyhold, and customary estates, are within the general purview of such acts. 3. Rep. 8. 2. Pasch. 29 Eliz. in the Exchequer. Heydon's Case.

Sav. 66, 67.
pl. 138. S. C.
in Scacc. and
S. P. by
Manwood
Ch. B. —
Mo. 128.
pl. 276.
Pasch. 35
Eliz. in
Scacc. S. C.
& S. P.
per Man-
wood. —

Co. Comp. Cop. 61. f. 53. cites S. C. — Supplement to Co. Comp. Cop. 77. f. 12. cites S. C. — Ibid. 86. f. 21. cites S. C. & S. P. — Godb. 369. pl. 458. Mich 2 Car. it was said per Cur. that such difference was taken by Popham Ch. J. 42 Eliz. B. R. in case of Baspool v. Long, that a custom which conduces to maintain copyholds extends to them, but a statute or custom which depraves or destroys them does not. — [This point does not appear in any of the reports of the case of Baspool v. Long.] — Cro. C. 42. &c pl. 4. Mich. 2 Car. C. B. the S. P. in case of Rowden v. Maltster. — S. P. by 3 justices. 2 Vent. 39. Pasch. 35 Car. 2. C. B. — Gilb. Treat. of Ten. 152. S. P.

48. Note, that in no case, *where the king claims a share in the forfeiture of the lands*, (as in the Statute H. 5. which speaks of lands forfeited for heresy, viz. that the king shall have annum, diem et vastum, as he hath for lands forfeited for felony) *copyhold lands are not within the general words of such statute*, for that in such case, if the copyholder committeth felony, the copyhold is presently forfeited to the lord of the manor, and therefore out of the words of that statute, and other the like statutes. Supplement to Co. Comp. Cop. 87. f. 21.

49. Copyholders are *comprehended* under statutes, *either by express limitation in precise words, or by a secret implication upon general words*. Co. Comp. Cop. 60. f. 52.

50. There is a difference between *penal statutes, which gave a forfeiture generally, or to particular persons*, as the king &c. Copyholders are within the first, because in such case the lord may

may enter, or the land may escheat to him, but they are not within the last. 2 Sid. 43. Arg. Hill. 1657. in Case of Harrington v. Smith.

51. The king cannot seise two parts of copyhold lands of a *recusant convict*. Hard. 33. Hill. 18 & 19 Car. 2. in Scacc. Duke of York & al. v. Sir John Marsham, Baronet.

It is true, statutes which regard criminal matters, have been

52. Those statutes which concern or *affect the state of the land* have been construed not to extend to copyhold, as the statute which gives *elegits*. Acton Burnel did not. Arg. Show. 287. Mich. 3 W. & M.

adjudged to reach it. Ibid. cites Le. 97. — Qw. 37. Anon.

53. Copyholds are held to be within the Statute of *Sewers* to be taxed, but not to be sold. Arg. Skin. 297. Mich. 3 W. & M. in B. R. in Case of Glover v. Cope. cites Callis Reading on the Statute of Sewers.

3 Lev. 127. S. C. — and the only reason why copyholds have been adjudged not to be within the purview of other statutes which contain general words, is, because of the respect to the lord's prejudice. Carth. 205. in case of Glover v. Cope. — 1 Salk. 185. pl. a. S. C. but S. P. does not appear.

54. *Particular statutes* by which the lord may have any *prejudice* as to fine or americiaments, do not bind copyhold tenements, as the Statute 8 H. concerning *Bankrupts* did not extend to copyholds, and therefore a subsequent law was to include them, neither did the Statute of *Recusancy* extend to such estates, and the reason given is, because the lord may thereby receive an injury by the loss of the customs and services, but *general laws* made for the publick good, and where the lords of manors can have no prejudice, are binding, and shall extend to copyhold lands, though not named in such statutes; Arg. 4 Mod. 84. Hill. 3 & 4 W. 3. B. R. in Case of Glover v. Cope.

(P. d.) Agreements between Lord and Tenants,

1. A *Custom of descent* in a manor, and many other things, were in controversy between the lord and tenants, and between the tenants themselves, and in the 10 Eliz. a *general agreement* made by deed indented, and a bill in *Chancery* establishing the same, but no record to be found, but the deed inrolled, though all the tenants of the said manor shall be stopped in the Chancery to speak against this, for it is for the repose of the realm notwithstanding pretence was made that agreement cannot alter a custom in law, that some were *infants*, some *feme coverts* at the time, and that the lord was but *tenant in tail*, of which opinion was Mr. Cook, Attorney General, and Justice Gawdy. Cary's Rep. 29, 30. cites 10 June 1602. 44 Eliz.

[178] 2. In the case of *tenant-right* between M. and some of his tenants on the borders, the Lord Chancellor pronounced, that neither in tenant-right nor in other copyholds would he make

make any order for all his tenants in general, but for special men in special cases, nor for any longer time than the present, except it were by agreement between the lord and tenants, which then he would decree if it appeared *reasonable*. Cary's Rep. 38. cites 8 June, 1 Jac. Musgrave's Case.

3. An agreement between the lord and tenants for settling *heriots*, and *flinting common*, was decreed to be affirmed. The lord sells the manor, and the purchaser, though he came not in privy, brought a bill to *revive the decree*, and had the same confirmed, though neither the lord nor tenants had greater estate than for life; *quære*. Vern. 427. pl. 402. Hill. 1686. Dunn v. Allen, S. P. and for reducing fines to a certainty. Fin. R. 154. Mich. 26 Car. 2. Meadows v. Patrick,

(Q. d) Cases of Agreements, and Covenants about Copyholds between Tenants and others.

1. A. Covenants to assure copyhold land to J. S. In an action by J. S. he needs not shew a court to be holden, for A. ought to procure a court to be holden. Cro. J. 102. pl. 35. Mich. 3 Jac. B. R. Fletcher v. Pynset.

2. A. seised of copyhold and freehold lands, settled the freehold lands on himself for life, remainder of part to his wife for life, for part of her jointure, remainder to his heirs male on the body of his wife, remainder to his heirs male of his body, remainder to B. his brother in tail male, remainder to his own right heirs, and covenants with the same trustees, to settle the copyholds to the same uses. A. going to make a surrender fell sick, but made a letter of attorney to do it, but died before it was done without issue male. The freehold lands remained to B. but the Court would not compel the heirs general of A. to execute the covenant to surrender. Ch. Cases 243. Mich. 26 & 27 Car. 2. Bellingham v. Lowther and Wentworth. A man covenanted for himself and his heirs, to surrender a copyhold estate to certain uses agreed upon, and died before it was done. A bill was brought for a specific execution of

this covenant, and the same was decreed accordingly. 9 Mod. 106 Mich. 11 Geo. in Canc. Neeve v. Keck.

3. Two copyholders upon a treaty of marriage between them surrendered their respective copyholds to the use of them and the survivor of them, and before marriage the man dies. The woman entered, and enjoyed for 30 years; it was insisted, that this was a trust for the man and his heirs till the marriage, and Lord Jeffries decreed a re-surrender, and an account of the profits from the death of the man. Vern. 432. pl. 408. Hill. 1686. Hamond v. Hicks.

4. Rent granted out of a copyhold, and which had been frequently alien by surrender and admittance for a valuable consideration, was made good in equity. 2 Vern. R. 16. pl. 10. Hill. 1686. Spindlar v. Wilford.

Though in strictness the rent would not pass by way of surrender,

yet the surrenders and admittances are evidences of the agreement for the sale. Ibid.

5. On marriage a freehold estate was settled on husband and wife for their lives, remainder to the first son in tail, remainder to trustees for 500 years, to raise daughters portions, remainder over, and *there was a covenant from baron to settle his copyhold estate to the same or like uses, and subject to the same trust on provisos &c. A surrender is made, but no term is limited. There was no issue male, and the freehold was sufficient to raise the daughter's portions. Bill dismissed at the Rolls, but Lord Somers, on appeal, decreed the copyhold estate to stand charged, and liable to raise daughter's portions. 2 Vern. R. 321. pl. 308. Mich. 1694. Shouldam v. Shouldam.

6. A. a copyholder of inheritance having no issue, intended to leave it to his nephew, but being taken ill, he had no time to surrender it to the use of his will, for want whereof the estate would descend to M. his sister; to prevent which A. got M. to give a bond of 2000l. to the nephew his son, conditioned to convey the lands to her son and his heirs upon request. The son, after A's. death, entered and died without issue, but left 2 sisters, no conveyance being executed by the mother; but Lord Chancellor decreed, that she was a trustee for her son and that she should surrender to her daughters, and they to be admitted as coparceners. 9 Mod. 62. Mich. 10 Geo. Alison's Case.

(R. d) Attorney. What Services may be done by Attorney.

1. **T**HE principal duty inseparably to be done to the person of the lord, and by his copyholder, is in doing of fealty, which upon every admittance he is to do the lord, for that is especially mentioned in the copy granted by the lord in these words, viz. Dat domino pro fine, et fecit domino fidelitatem, and fealty cannot be done but in person, and not by an attorney. And although (as Mr. Littleton saith) fealty may be taken by the steward of the court of the lord of the manor, yet it is done to the lord himself, and it must be done by the copyholder himself in person. Supplement to Co. Comp. Cop. 83. f. 18. cites 9 Rep. in Comb's Case 75.

2. The suit and service which is to be done in the court of the lord by his copyholder must be done in person and not by another for him, and it is to be done upon oath, and a man cannot swear by attorney, and therefore he cannot make an attorney to do his suit and service, but the same must be done by him in person. Supplement to Co. Comp. Cop. 83. f. 18.

3. Some particular things a copyholder may do by his attorney; as he may pay his rent by his servant or attorney, or tender it by them, and such payment and tender shall be good. Supplement to Co. Comp. Cop. 83. f. 18.

4. So if the *custom* of the manor be, *that upon the death of every copyholder the tenant shall pay and tender his best beast* unto the lord for a heriot, there the *heriot may be paid by the heir* before his admittance, *or by the executor* of the copyholder, and such payment or tender of it shall be good. Supplement to Co. Comp. Cop. 83. f. 18.

(S. d) By-Laws.

[180]

1. **T**HE tenants may *change the by-laws* at the next court without the consent of the lord, per Dyer. Dal. 95. pl. 23. 15 Eliz. Franklin v. Cromwell.

2. By-laws made in *court baron to bind strangers* that are not tenants of the manor, are void. Savil, 74. pl. 151. Mich. 25 & 26 Eliz. Anon.

3. If the *homage only* make by-laws, and not all the tenants, the by-laws are void. Savil, 74. pl. 151. Mich. 25 & 26 Eliz. Anon.

4. To make by-laws that they shall *not put in their cattle in their severalties before such a day* is void. Savil, 74. pl. 151. Mich. 25 & 26 Eliz. Anon.

5. By-laws *to bind strangers* are not good, though they are made by the homage, and by all the tenants, and of such things whereof by-laws may be made. Savil, 74. pl. 151. Mich. 25 & 26 Eliz. Anon.

6. Every by-law ought to be made *for the common benefit* of the inhabitants, and not for the private commodity of any particular man, as J. S. only, or the lord only; as if a by-law be made that none shall put his beast into the common field before such a day, it is good; but if a by-law be made that they shall *not carry hay upon the lord's lands, or break the hedges of J. S.* this is not good, because it respects not the common benefit of all; per Periam J. Godsb. 79. pl. 13. Hill. 30 Eliz. Anon.

7. Per Windham J. some books are, that by-laws shall *bind no more than such as agree to them.* Goldsb. 79. pl. 13. Hill. 30 Eliz. Anon.

8. A by-law in a manor *binds the tenants without notice*, because they are supposed to be within the manor; per Hale Ch. J. Vent. 167. Mich. 23 Car. 2. B. R. Isaac v. Ledgingham.

(T. d) Charitable Uses.

See tit.
Charitable
uses.

1. **I**N case of charitable uses the *lord of the copyhold shall have his duties* always of *fines, heriots &c.* of the heir, or purchaser, in whose name the interest of the copyhold rests in law, and he shall have an *allowance* made him out of the charitable use. Mo. 890. pl. 1253. Anno 1586. Rivet's Case.

[U: d]

(U. d) Common.

How Lord or Tenant are interested therein, and
also in the Soil.

*A. custom for one copyholder to have common &c. in his lord's soil is good; for all the other copyholders may have for-
feined their estates or interest therein.* *Gillb. Treat. of Ten. 208.*

1. **THIS** custom might have a lawful commencement that one copyholder should only have common &c. in the land of the lord, and by the custom of some manors, some copyholders have common in one waste of the lord, and some in another separately, and all the copyholders may be extinct, save one. 4 Rep. 32. a. b. pl. 25. Mich. 29 & 30 Eliz. B. R. Foilston v. Cracherode.

If the lord makes a lease for years of the manor with exception of the trees, and the lessee or his assignees grant a copyhold for 3 lives according to the custom, and it is found that the custom is, that a copyholder may top and lop the trees for fireboot; he may justify the doing it; because the copyholder is in by the custom, paramount the exception of the trees in the lease; adjudged by all the court. Mo. 811. pl. 1098. Trin. 5 Jac. C. B. Swaine v. Becket. ——— Brownl. 231. S. C. held accordingly per tot. Cur.

2. If the copyholder for life has used to have common of pasture or estovers in the lord's woods or wastes, and after the lord alien the wastes, or woods to another in fee, and after grants a copyhold estate according to the custom, the copyholder must have common there as hath been used, but in this case the custom must be laid specially; otherwise it is of a lease for life by deed. 8 Rep. 63. b. 64. a. Mich. 6 Jac. Swayne's Case.

3. In trespass &c. Quare clausum fregit &c. and putting in his cattle &c. The defendant justified, for that the place where is parcel of the Manor of Haye, in which manor there is a custom, that it shall be lawful for the lord of the manor to have common in the lands of the tenants thereof for life, or years, when they lie fresh, and upon a demurrer this was adjudged a void custom, and against law, that the lessor should have common against his own demise, because it is parcel of the thing demised. Palm. 211. Mich. 19 Jac. B. R. White v. Sawyer.

4. The Lady W. being lady of the Manor of Stepney, exhibited a bill to establish an usage and custom within the said manor ever since the reign of H. 8. which was, that the lords of the said manor might, upon the presentment of 7 of the copyholders thereof, determine what waste ground was fit to be set out and inclosed, in order to build on the same, and such presentment being agreed unto by the major part of the homage at the next court, the same was set out and inclosed accordingly, without any molestation or disturbance by the tenants; that such a presentment was made in manner as aforesaid of several parcels of waste ground to build on in Mile-End Green, where since
the

the great fire, filth and carrion have usually been laid, to the great annoyance not only of some of the tenants, but of all others passing that way; that this presentment was allowed by the major part of the homage at the next court, and which is now sought to be established by a decree of this court, the rather, because it is opposed by some of the tenants of the said manor, who have brought actions &c. pretending, though very untruly, that they have a great loss of common by setting out and enclosing such ground; that by indenture dated 15 June, 15 Jac. the Lord W. in consideration of 3500*l.* paid to himself, and 3000*l.* more to his father Henry, Lord W. [182] did grant and confirm to the tenants their privileges and customs, and particularly the commons which they then enjoyed, with liberty to dig gravel, clay, or loam, to repair or build any of their copyhold tenements, and covenanted for the quiet enjoyment against him, his heirs and assigns; that the reason why no disturbance of this nature hath been hitherto given is, because there was never any such inclosure for building, under pretence of such an usage and custom till now. Upon reading of several court rolls of the said manor from the reign of Hen. 8. till the reign of Car. 2. relating to the said usage, and hearing all parties, the Court decreed, that this was reasonable usage, and fit to be established, and that the plaintiff hath proceeded according to the usage in procuring the said waste ground, called Mile-End Green, to be set out, presented, and allowed by the homage, and inclosed as aforesaid, and so had power to grant leases and estates thereof at her pleasure to be inclosed, and kept in severalty &c. Fin. Rep. 263, 264. Trin. 28 Car. 2. 1676. Lady Wentworth & al. v. Clay & al.

(W. d) Copyholders Interest as to Commons.

1. **T**HOUGH the copyholders have *solam & separalem pasturam* &c. yet the lord may distrain for other damage the *beast of a stranger*, who has no right to put in his beasts, though the lord has no interest in the herbage; per Hale Ch. J. 2 Saund. 328. Hoskins v. Robins.

Vent. 123.
S. C. adjournatur. —
Ibid. 163.
S. C. the whole court held the prescription

good, and being laid as a custom in the manor, it was not needful to express the copyhold estates; that it does not take away all the profit of the land from the lord; for his interest in the trees, mines, bushes, &c. continues.

2. The customary tenants of a manor allege a *custom pro sola & separali pastura in &c. quolibet anno per totum annum* &c. The custom is good, and might also have a reasonable commencement; one may prescribe for the sole feeding, because it might have its commencement by grant, and if it be good by prescription, it may be good by custom, and such a custom at first might commence by the voluntary agreement of the lord with the tenants to induce them to hold their estates, which were then but estates

a Lev. 2.
S. C. and the custom held good.

estates at will, and to bestow their pains and labour in improvement, and so a continual usage had now made a custom for the same reason, that it had now fixed their estates and made them permanent, and enabled them to bring actions against their lord, if he puts them out of their estates contrary to the custom. 2 Saund. 326. 328. Pasch. 23 Car. 2. B. R. Hofkins v. Robins.

3. In Canc. Mich. 1726, in Manor of Hamstead, one Rous having built the Long Room on *Hamstead Heath* by a new copy from the lord, without the consent of the homage, a bill for establishing the custom of this manor prayed to pull it down, as an incroachment on the common or waste, but issues being directed to try several other customs of this also, King Chancellor said, that though it might be reasonable for Rous to be restrained from building any farther, yet as to *what he had done, being supposed at 3000l. expence, the commoners standing by*, he would not let be pulled down, for *on laying the first stone the commoners ought to have objected to it*, and an injunction, staying him to go on to finish his buildings, was dissolved; this was declared provisionally until the issues were tried. MS. Rep.

[183] (X. d) Cottages built on the Waste.

1. **T**HE plaintiff was lord of the Manor of Ewell in Surry, and brought his bill, claiming an house in Ewell built upon the waste. It was said by Lord Chancellor, that the lord of a manor is never said to be out of possession; that what is built upon the waste is his, and that upon a trial before Justice (John) Powell, touching some cottages or tenements built upon the waste, *though the lord had not been in actual survey of the cottages or tenements in question for 60 years, and there had been several fines levied thereon*, by the opinion of the Judge *the lord had a verdict.* MS. Rep. 13 July, 1726, in Canc. Loyd v. Bartlet.

2. It has been ruled in evidence at the assizes, that a *cot-tager* on the lord's waste lives there by the lord's consent, and so is *only tenant at will*, but this is very doubtful where there has been a *long possession*; said by Pratt Ch. J. Mich. 11 Geo. B. R. And per Cur. *20 or 25 year's possession is a good title in an ejectment, as well as a bar to an ejectment.*

(Y. d) Court-Rolls.

What Interest the Tenant has in them.

1. **I**T was ordered, that court-rolls should be brought and *shewed to counsel, to shew which is copyhold, and which is freehold.* Toth. 109. cites 12 Jac. Corbett v. Pesthall.

Lord, and
tenants, and
copyhold-

2. *Tenant by copy has an interest in the rolls of the court as well as the lord, because it is his evidence, and the lord cannot deny*

deny copyholder *access* to the rolls; per Doderidge. Lat. 182. Mich. 2 Car. Widow Stacy's Case.

ers, may have a bill one against another to

have the use of them, as well as against strangers. Hard. 180. pl. 2. Pasch. 13 Car. 2. in Scacc. in case of Langham v. Lawrence. — 5 Mod. 396. S. P. per Cur. Pasch. 10 W. 3. — D. 1664. Marg. pl. 38. cites S. C.

3. A copyholder being sued in B. R. for certain lands, *moved that the steward* of the court might be ordered to bring in the rolls into B. R. that by them he may be the better enabled to defend his title to the lands; per Roll J. this court cannot order him to do it, so would make no rule in it. Sty. 128. Trin. 24 Car. B. R. Anon.

5 Mod. 396. Arg. and seems admitted by the court, that it has been frequently ordered for

stewards to grant copies, and produce the rolls at trials. — Fin. Rep. 249. Pasch. 28 Car. 2. ordered that the plaintiff, in a bill for discovery of deeds &c. should have recourse to the records, rolls, and evidences of the manor, in which the lands claimed, lie, to view, peruse, and take copies thereof, (paying for the same) and ordered, that the defendant and his heirs, lords of the said manor, should produce so many thereof at any trial at law as the plaintiff or his heirs should at any time require to be produced, but at the charge of the plaintiff, his heirs, or assigns.

4. Bill to have certain surrenders made up and engrossed which were made, but not engrossed; plaintiff and defendant were brothers; per Finch K. the father being lord of the manor cannot declare the trusts of copyhold granted to his son, though he took the profits always by their consent. Ch. Cases 261. Trin. 27 Car. 2. Dowdswell v. Dowdswell.

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5. If the lord of a manor refuses a tenant a sight, or copy of a court-roll, to make such use of them as the tenant shall think proper, either to ground a fine upon or make his defence, he said Hale was of opinion an attachment should go against the lord; per Holt Ch. J. 11. Mod. 111. Pasch. 6 Ann. B. R. Anon.

(Z. d) Customary Court.

1. IF the lord of a manor having many ancient copyholds in a will grants the inheritance of all of them, the grantee may hold court for the customary tenements, and accept surrenders to the use of others, and make admittances and grants; for though it be no manor in law because it wants frank-tenants, yet as to the copyhold tenants the feoffee or grantee has such a manor, that he may hold court and make admittances and grants of the copyhold tenements; for every manor which consists of frank-tenants, and copyhold tenants, comprehends in itself 2 several courts, viz. a court baron for the frank-tenants, in which the suitors are judges; and another for the copyholders, in which the lord or the steward is judge; and the grantee of the inheritance of the copyholds may hold such court for the copyhold tenements only, as the grantor might. 4 Rep. 26. b. Trin. 30 Eliz. B. R. the 3d Resolution in Case of Melwick v. Luter.

Cro. E. 109, 103. pl. 10. S. C. held that though the tenements are divided from the rest of the manor, yet, the custom remains, and they continue copyholders, paying their services and duties &c. and that he who has the freehold of

them may keep a court in any place, and it is not properly a court baron, but as a court of survey, Vol. VI.

at which copyholds may well be granted, and the lord or his steward may grant copies out of court as well as in court. — Ibid. the reporter adds a nota, that a writ of error was brought of this judgment in the Exchequer Chamber, and the error assigned in the matter of law, but no judgment given; for the parties compounded, and agreed with the plaintiff in the writ of error, and he had the lands, as Ewens who was of his council told me, for he said, that all the justices and barons in the Exchequer Chamber did hold clearly, that it was a void grant by copy; for being divided from the manor, the custom to demise them is altogether gone and destroyed, so as the estates for life which were in esse at the time of the alienation of the freehold of them and severance of them, being now determined by surrender, or otherwise, no new copy can be made, yet the alienation of the freehold of them doth not destroy the estates of the copyholders then in esse, but they shall hold them during their estates, paying their services; but no new estates may be afterwards granted by copy. Gilb. Treat. of Ten. 196. says, that since every manor, consisting of freeholders and copyholders, has courts, one a court baron, and the other a court for copyholders, whereof the steward is judge, what reason is there, these being several courts, and there are several judges of them, that the want of freeholders should hinder the grantee from keeping a court for granting estates by copy, especially since the consequence is so fatal; and therefore if the lord releases the service and tenure of his freeholders, yet the lord may keep a court for his customary tenants, and so though the lord cannot make a manor of one, consisting of demesnes and services, yet by his own act he may make a manor of copyholders: this seems to be but a division of the courts, which before were in one, for a manor seems to be so to two intents, as to the freeholders and as to the copyholders, and so in effect seems to be a double manor, and therefore are there several courts in effect, and several judges, according to the matter that is before them; and so it is no new making of a manor to grant the inheritance of the copyholds, but only to put that into the hands of a man which before was in one, and yet was as much two manors then as now.

4 Rep. 26. b.
27. 2. S. C.
and held per
tot. Cur. that.

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such lessee
might hold
court for
the copy-
holds ac-
cording to
the resolu-
tion of the
3d point in

Melwich's Case and cited it as so resolved in Sir Christopher Hatton's Case, and the reporter says, nota, a good diversity between those cases which consist of a number of copyholds which may support a custom and a single case of a copyhold, as in Murrel's Case, in which the lord did not grant tacitly any customary court, nor the grantee, having but one single copyhold, could not hold court. — Gilb. Treat. of Ten. 196. cites S. C. and the same diversity.

Supplement
to Co.
Comp. Cop.
82. f. 7.
cites S. C.
— Gilb.
Treat. of
Ten. 199.
cites S. C.
says that this
being done
by act in law
no prejudice
could accrue
to any body.

2. Lord of a copyhold manor leased the court baron for 2000 years, saving to himself the other demesnes and services; the lessee held court, and a copyholder surrendered to the use of A. in fee. It was held, that a copy to A. was good, and Anderson said it had been held so in Lord HATTON'S CASE and several others since, and that it had oftentimes been held, that the court may well continue as to that purpose for admittance of copyholders, for otherwise every one of his own act might destroy his copyholder's estate. Cro. E. 494. pl. 21. Paich. 37 Eliz. C. B. Jackson v. Neal.

3. If a feme be endowed of several copyhold tenements, she may keep a court and grant copies, though the services of any of the freeholders were not allotted to her, but the demesnes and the copyhold tenements only; for though she having no services cannot hold a court baron, yet she may have a special court for this purpose, and it is good enough; per Popham clearly, and cited SIR CHRISTOPHER HATTON'S CASE for Wellingborough, where it was adjudged, that where he had 20 copyhold tenements, parcel of the said manor, granted to him by the queen, and because some of them refused to come to his court they forfeited their copyholds. Cro. E. 662. pl. 10. Paich. 41 Eliz. B. R. Gay v. Kay.

(A. e) Customs. Good. And How to be Proved.

1. THE custom of *Cliven or Landmark* is, that if any copyholder is *about to sell* his copyhold, *proclamation shall be made in court*, that *if the next of blood* of the vendor, or in default of him, the *next neighbour* of the vendor shall come to court at sun-rise, and *will pay as much as the bargainee* has agreed to pay, that he shall have the land notwithstanding the bargain. Jenk. 274. pl. 95.

2. Continuance for 50 years is requisite to fasten a *customary condition* upon the land *against the lord*, and seizure for a forfeiture is an *interruption* of the continuance, so that the time before the forfeiture is of no account, per tot. Cur. 3 Le. 107. pl. 158. Trin. 26 Eliz. B. R. Taverner v. Cromwell.

4 Rep. 27:
b. pl. 15.
S. C. but
S. P. does
not appear.
— Cro.
E 353. pl.
10. S. C.

but S. P. does not appear.

3. In trespass the *issue was, if the lord of the manor granted the lands per copiam rotulorum curiæ manerii secundum consuetudinem manerii prædicti*. It was given in evidence, that the lord of late, at his court, granted the lands *per copiam curiæ*, where it was never granted by copy before; in that case the jury are bound to find *quod dominus non concessit*, as it was holden by the Court; for although *de facto dominus concessit* per *copiam rotulorum curiæ*, yet *non concessit secundum consuetudinem manerii prædicti*. Supplement to Co. Comp. Cop. 82. f. 16. cites Leon. 56. Pasch. 29 Eliz. C. B. Kemp v. Carter.

4. To prove a custom *to grant leases for years*, it is not sufficient to prove it for 30 or 40 years, but it ought to be from time whereof &c. Cro. E. 351. pl. 3. Mich. 36 & 37 Eliz. B. R. Jackman v. Hoddeston.

5. Custom *to seise the land till fine made* with the lord, for it was held a reasonable custom. Cro. E. 351. pl. 3. Mich. 36 & 37 Eliz. B. R. Jackman v. Hoddeston. [186]

6. There is a *difference between a prescription for freehold land and for customary land*; for customs, which concerns freehold, ought to be throughout the county, and cannot be in particular place, 45 Aff. But a prescription concerning copyhold land is good in a particular place, for *de minimis non curat lex*, and the law is not altered thereby, and it may be there is but one copyholder there, for which he might prescribe, and Beaumont agreed this difference, for custom to have profit apprender, privilege, or discharge, may very well be in a particular, and by Owen it was ruled accordingly in COLLIER'S CASE in the Queen's Bench. Cro. E. 353. pl. 10. Mich. 36 & 37 Eliz. C. B. in Case of Taverner v. Cromwell.

- Roll. Rep. 7. Custom that a copyholder for life may nominate one or two
 48. pl. 17. to succeed him for a fine to be assessed by the homage, if they can-
 Trin. 12. not agree with the lord, adjudged to be good. Noy. 3. Pasch.
 Jac. cites 3 Jac. B. R. Crabb v. Bales.
 CRABB v. Bales.
 BEVIS,
 S. P. adjudged in C. B. and affirmed in B. R.

8. It is not sufficient to *prove an usage for the sole pasture* to shew that the tenants only had fed it, unless it were proved also, that the lord had been opposed in the putting in of his cattle, and the cattle impounded from time to time; per Hale Ch. J. Vent. 165. Mich. 23 Car. 2. B. R. Hoskins v. Robinfon.

(A. c. 2) Customs pursued. In what Cases they must be.

1. IF the custom does warrant estate only *durante viduitate*, and the lord admits for life; this shall not bind his heir or successor, because custom has not sufficiently confirmed it. Co. Com. Cop. 52. f. 41.

2. So if the lord fail in reserving *verum & antiquum redditum*, as if he reserved 10s. where the usual rent customably reserved is 20s. this may be a means to avoid the admittance. Co. Comp. Cop. 52. f. 41.

3. And the law is very strict in this point of reservation, for though the ancient accustomed rent be reserved according to the quantity, yet if the quality of the rent be altered, the heir may avoid this grant. For if the ancient rent from time to time has been 20s. in gold, and the lord reserves it in silver, this variance of the quality of the rent is in force to destroy the grant. Co. Comp. Cop. 52. f. 41.

4. So if the ancient rent has been customably paid at 4 feasts in the year, and the lord reserves it at 2 feasts. Co. Comp. Cop. 52. f. 41.

5. So if 2 copyholds escheat to the lord, the one of which has been usually demised for 20s. rent, the other for 10s. rent, and he grants them both by one copy for one rent of 30s. this is not good. Co. Comp. Cop. 52. f. 41.

[187] 6. So if a copyhold of 3 acres escheats, which has ever been granted for 3s. rent, and the lord grants one acre, and reserves pro rata 1 s. rent, verus & antiquus redditus is not reserved. Co. Comp. Cop. 52. f. 41.

7. But if a copyhold of 6 acres, which has ever been demised for 6s. rent, escheats to 2 copartners, and one grants 3 acres, reserving 3s. pro rata; this is a perfect reserving. Co. Comp. Cop. 52. f. 41.

8. A custom was found in a manor, that where an estate was granted to A. for life, remainder to B. for life, remainder to C. for

for life, that *A.* had power to destroy the remainder by surrendering the estate in court &c. and it was found that *A.* granted it away by fine, and it was held per Cur. that the remainders were not destroyed nor granted by the fine; for this being a custom against common right, that one man should destroy the right of another, it ought to be pursued strictly; and the custom being found to do it by surrender, a fine shall not have that operation within the custom, Freem. Rep. 263. pl. 284. Mich. 1679. Talmarsh v. Zinzay.

(A. c. 3) Customs. General or Special. Good or not. And Extent thereof.

1. A Custom that a lessee for years may hold the land for half a year after his term ended, is no good custom; agreed by all the Justices, but the lord of a copyhold may by custom lease the same for life, and 40 years after, and it is good, but a custom that lessee for life may lease per autre vie is not good; per Montague and Hales. Mo. 8. pl. 27. Hill. 3 E. 6. Anon. S. C. cited, Gilb. Treat. of Ten. 307.

2. By the custom of a manor, the lord of a manor might assign one to take the profits of a copyhold descended to an infant, during his nonage to the use of the assignee, without rendering an account, and the same was holden to be good custom; as a rent granted to one and his heirs, to cease during the nonage of every heir. Le. 266. pl. 357. 20 Eliz. C. B. Anon.

3. A copyholder did allege the custom to be, that the lord of the manor might grant copies in remainder with the assent of the tenants, and not otherwise, and that copies in remainder otherwise granted should be merely void. The question was, Whether it were a good custom? The Justices did not deliver any opinion in the point. Shuttleworth Serjeant said, that this custom might have a lawful beginning, and it seems to be grounded upon the reason of the common law, that a remainder should not be without the assent of the particular tenant, and therefore it is a good custom. It was adjourned. Godb. 140. pl. 171. Mich. 31 Eliz. C. B. Anon. Supplement to Co. Comp. Cop. 84. f. 19. cites S. C. and says, quære the case; for it was not resolved.

4. A custom was, that a copyholder of inheritance might make a letter of attorney to 2 jointly and severally, to surrender his copyhold lands in fee to certain uses after his death. It was resolved, that the custom was a void custom, because by the death of the copyholder the lands were settled in the heir, and an authority given to divest him was not good. Supplement to Co. Comp. Cop. 85. f. 19.

5. If the lord have used certain work-days of his tenants, and that has not been used by the space of 20 years last past, yet that non user is no discharge to the tenants, so that there be any in life that can remember the same. Calth. Reading. 25.

6. If the tenants have used to pay to their lord every 4th year a double rent, and every 6th year an half rent, this is a good inter-user. Calth. Reading, 26. [188]

7. If the custom is, that *if the copyholder dies without heir, that then the eldest tenant of that name, of the said manor, shall have his land*, this is a good custom, and contains in itself sufficient certainty. Calth. Reading, 31.

8. Customs and prescriptions *must be according to common right*, that is, to prescribe to have such things as is their right and reason to have, and *not* by custom of prescription to claim things by way of extortion, or thereby to exact fines, or other things of his tenant, without good cause or consideration. Calth. Reading, 33.

9. If the tenants have *used when they sow their lands to pay the lord rent coin, and when it lies in pasture to pay their rents in money*, this is a good inter user. Calth. Reading, 25.

Gilb. Treat. of Ten.

305. cites S. C. that it is a void custom, because it obliges the lord who has the interest, to grant it to this or that particular person, whether he will or not.

10. Custom, that after the death of the tenant for life of a copyhold, the lord is *compellable to make an estate to the eldest son for life, and if he hath no son to the daughter*, and so in perpetuum. Popham and Cook were of opinion, that the same was against law, it being to compel the lord to make a grant, but otherwise where he is only to make an admittance. Mo. 88. pl. 1088. 4 Jac. in the Star-Chamber. Lord Grey's Case.

S. C. cited Gilb. Treat. of Ten. 303.

11. Custom that *if a copyholder in fee marries, if the wife survives she shall have the fee*, et sic e converso, and agreed to be good. Noy. 2. cites Taunton Dean Custom's Case.

Roll. Rep. 125. pl. 7. S. C. reports the custom to be, that every copyholder for life may

12. Custom, *that copyholder for life in extremis may nominate his successor to have the copyhold, paying a reasonable fine to be agreed upon by the lord, or if that fail to be assessed by the homage*, and a good custom. Noy. 2. cites Yelmeister Custom's Case.

nominate who shall have it for life after his death; Coke and Doderidge said, that this had been adjudged a good custom in B. R. and in C. B. — Ibid. 195. pl. 37. S. C. and judgment per tot. Cur. against the plaintiff. — Gilb. Treat. of Ten. 305. cites S. P. as good, for it is a right and interest vested in the tenant for life; sed quære.

4 Le. 237. pl. 331. Ball's Case, S. C. but the tenants sought not to give a less sum for a fine than used to be paid. where the lord would assess a reasonable fine; and adjudged a good custom.

13. By an especial custom within the manor, a copyholder may appoint or *nominate, in the presence of two tenants of the manor, or other 2 sufficient witnesses, who shall have his copyhold lands after his decease, and also that they may appoint what fine the lord shall have for the admittance of the tenant, so it be a reasonable fine*, and such disposition of his lands and appointment of the fine shall be good by the custom, but yet after such disposition made, the party who is to have the land must in person come into the lord's court, and pray to be admitted unto the same; and so was it very lately adjudged in C. B. both for the point of the custom, that it was a good custom and admittance. Supplement to Co. Comp. Cop. 83. f. 18. cites Mich. 5 Jac. in B. R. Bale's Case.

14. It

14. It was ruled by the whole Court, that if a *custom* be alleged, *that the eldest daughter shall solely inherit, that the eldest sister shall not inherit by force of that custom.* Godb. 166. pl. 232. Pasch. 8 Jac. C. B. Rapley v. Chapleyn.

Such custom shall be taken strictly. Supplement to Co. Comp.

Cop. 84. f. 19. cites S. C. — 4 Le. 249. pl. 395. Ratcliffe v. Chaplin, S. C. and Coke Ch. J. said, that there are two pillars of a custom, one the common usage, and the other, that it be time out of mind, and therefore upon the evidence given to the jury the court enforced the parties who maintained the custom, to shew precedents in the court rolls to prove the usage, and he said, that *without such proof, and that it had been put in use, although it had been deemed and reported to have been the true custom, yet the court cannot give credit to the proof by witnesses.

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15. So if the custom be that the *eldest daughter and the eldest sister shall inherit*, the *eldest aunt shall not inherit* by that custom. Godb. 166. pl. 232. Pasch. 8 Jac. C. B. Rapley v. Chapleyn.

4 Le. 242. pl. 395. S. C. & S. P. agreed per Cur.

16. So if the custom be that the *youngest son shall inherit*, the *younger brother shall not inherit by the custom*; and Foster J. said, that so it was adjudged in one Denton's Case. Godb. 166. pl. 232. Pasch. 8 Jac. C. B. Rapley v. Chapleyn.

4 Le. 242. pl. 395. Ratcliffe v. Chaplin, S. C. & S. P. agreed per Cur.

17. Custom, *that if a copyholder will sell his copyhold estate, that he which is next of blood to him shall have the refusal, and if none of his blood, then he which inhabits in the nearest part of the part of the ground shall have it before a stranger, giving for that as much as a stranger would, and the lord shall have him for his tenant, whether he will or no*; for it shall be intended, that so it was agreed at the first, and it is reasonable, and if it had not been ruled and adjudged before, yet he conceived it might now be a rule and adjudged, inasmuch that it is so reasonable and good; per Warburton J. 2 Brownl. 196. Trin. 10 Jac. C. B. in case of Rowles v. Mason,

Brownl. 132. S. C. but S. P. does not appear. — Gilb. Treat. of Ten. 307. cites S. P. and says, it seems that the reasonableness of a custom is to be considered, not from

the rules and maxims of the common law, (for there is no custom but what in some point or other overthrows the common law) but from the conveniency of the thing itself; as if there be a custom that a copyholder shall not put in his beasts to take the common before the lord has put in his, this is a void and unreasonable custom, because it is in the power of the lord by this means to take away the interest of his commoners.

18. Upon evidence it was admitted by the court to be a good custom, *that an executor or administrator shall have a year in the land of a copyholder against the wife that claims her frank-bank or durante viduitate.* Noy. 29. Hill. 15 Jac. C. B. Rennington v. Cole.

Gilb. Treat. of Ten. 303 cites S. C.

19. The custom of a manor was, *that the land was demisable for 21 years, paying the treble value of the rent, and if he die within the term, that the term should be to his heir, paying a fine certain of one year's rent, and if he assigned it, the assignee to have it for a fine of one year's value of the rent, and that he who had it might by the custom renew it for 21 year, paying 3 years value, and the custom was admitted per Cur. to be good.* Cro. J. 671. pl. 2. Mich. 21 Jac. B. R. Page's Case.

S. C. cited Gilb. Treat. of Ten. 307. Supplement to Co. Comp. Cop. 85. f. 19. cites S. C.

20. Custom of a manor, *that the steward might make law and ordinances for the better ordering the commons, and to assess a sum*

Jo. 421. pl. 9. S. C. & S. P. agreed

but exception was taken as to other matters, in which the court differed.—

Cro. C. 497. pl. 2. James v. Tutney, S. C. & S. P. adjudged and affirmed in error.—
Gilb. Treat.

of Ten. 306. cites S. C. and that the custom is good; but that an order that a tenant shall not put in this or that beast is void, because it takes away his inheritance; but if it were that he should not do it before such a day, that is a good bye-law, being not restrictive of his inheritance, but only directive of it.— See tit. bye-laws (A. 2) pl. 14.

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Gilb. Treat. of Ten. 305. cites S. C. accordingly; for the under-tenant is not a mere stranger.

a sum by way of penalty on those tenants who broke those orders, and also to prescribe to distrain for that penalty; the steward made an order, that he who should put his cattle beyond such a boundary should pay 3s. 4d. The plaintiff James offended against this order, and thereupon a penalty was assessed on him, for which Tutney, the defendant, as bailiff of the lord, distrained, and in replevin made cognizance for the taking, &c. adjudged, and affirmed in error that this was a reasonable custom, for it did not take away the profit of the commons, but this order sets limits, and bounds to them. Mar. 28. pl. 64. Trin. 15 Car. James v. Tintney.

21. The custom was, that *if a copyholder suffer his house to be out of repair, that he might be amerced, and that the lord might distrain his tenants cattle, and likewise the cattle of any under-tenant, levant and couchant* on the copyhold lands, for the said amercement, which was done accordingly. Bramston Ch. J. held, that this was a good custom; for the custom that gives the distress knits it to the land, and therefore not merely personal; and if the custom had not extended to the under-tenant, yet he might have distrained him; for otherwise the lord by such a devise of making a lease for one year by the tenant he should be defeated of his services. Mar. 161, 164. pl. 231. Hill. 17 Car. Thorne v. Tyler.

22. The custom of a manor was, that *if a copyhold tenant did suffer his messuage to be ruined for want of reparations, and the same be presented in court by the homage, that such a tenant should be amerced, and that the lord had used to distrain the beasts as well of the under-tenant as of the tenant himself, which were levant and couchant upon the lands, for such amercement.* It was said, that the custom was not good, but unreasonable, to distrain a stranger's cattle, such as the under-tenant was; but it was resolved, that the custom was good; for the under-tenant, although he was but tenant for a year, yet he should have all the benefits and privileges which the copyholder himself should have had, & qui sentit commodum sentit debet & onus, and he is distrainable for the rents and services due and payable to the lord, and the charge lies upon the land, and not upon the custom, and therefore the custom is good. Supplement to Co. Comp. Cop. 85. f. 19. cites Pasch. 17. Car. in B. R. Thorn v. Tyler.

Gilb. Treat. of Ten. 310. cites S. C.

23. Copyholder of inheritance made a *letter of attorney to &c. to surrender his copyhold lands after his death to certain uses,* according to the custom of the manor &c. Adjudged, that this is a void custom, because it is to convey lands against the rules of law for conveying copyholds, for that must be either by surrender into the hands of the lord, or into the hands of 2 customary

customary tenants, to the use of his will, which must be executed in his life-time. Nelf. Abr. 506. pl. 10. cites Sty. 311. Hill. 1651. B. R. Wallis v. Bucknall.

24. Suppose that there was a custom, that if the house of a copyholder falls, the materials shall be the tenant's, Powell J. asked, if that could be good? 11 Mod. 94, 95. pl. 3. Mich. 5 Ann. B. R. Anon.

(A. e. 4) Customs unusual, and interfering. Good or not.

1. **T**HE manor of Wadhurst in the county of Sussex consisted of 2 sorts of copyhold, viz. *sok-land* and *bond-land*, and by several customs *disseverable* in several manners; as if a man be first admitted to *sok-land*, and afterwards to *bond-land*, and dies seised of both, his heir shall inherit both; but if he be first admitted to *bond-land*, and afterwards to *sok-land*, and of them dies seised, his youngest son shall inherit, and if of both simul & semel, his eldest son shall inherit; but if he dies seised of *bond-land* only, it shall descend to the youngest; cited by Anderson Ch. J. 1 Le. 56. pl. 70. Pasch. 29 Eliz. C. B. in Case of Kempe v. Carter.

(B. e) Where a Copyhold shall be said in by [191] Descent or Purchase.

1. **I**F the father purchases [copyhold] and dies before admission, his heir shall be in by purchase; per Nudigate J. 2 Sid. 38. Hill. 1657.

Gilb. Treat. of Ten. 271. cites S. C. and says, that accord-

ing to this is Roll. [See Roll. Descent (I.) pl. 9.]

2. But Ibid. 61. in S. C. Glyn Ch. J. held, that if a man, seised of copyhold land in fee of the custom of Borough-English, surrenders according to the custom to the use of J. S. and his heirs, J. S. having issue 2 sons, dies before admission, it seems that the youngest son shall have the land, because he is in by descent, or at least by force of the first surrender, and so in nature of a descent.

Gilb. Treat. of Ten. 271. 272, cites S. C. & S. P. accordingly by Glyn, and says, that so are some other opinions

that are more late, and that therefore it was held, if land, of the nature of Borough-English, be surrendered to one and his heirs, and he dies before admittance, that the youngest son shall be admitted, and this opinion seems to be very reasonable, for heirs were in the limitation certainly as words of limitation, and not of purchase; and certainly there is as much reason to adjudge the heir in by descent here, as there is to adjudge an heir in by descent where a recovery was had against the ancestor, but not executed until after his death, because the use might have vested during the life of the ancestor, and because the execution hath a retrospect; and in truth the case of a surrender is just the same; for admittance might have been in the life of an ancestor, and when it was had, it had a retrospect.

(C. e). Descent. How. And where there shall be Possessio Fratris.

The remainder is in consideration of the law, and the estate of the first sister is not so determined, that any can take advantage of it,

for the lord against this lease by deed indented cannot enter, or claim any thing, and the second sister, although she hath not agreed, yet she cannot enter during the life of her elder sister, for her remainder takes effect in possession after the death of her said sister; but if any should take advantage of it, it should be the lord, if his deed indented did not stand against him; and afterwards judgment was given against the younger sister. Clench J. was of another opinion, viz. that the entry of the younger sister, notwithstanding that her elder sister was alive, was lawful & quære of that. 2 Le. 73. pl. 97. Trin. 28 Eliz. B. R. Curfew v. Cottell.

1. A Copyholder in fee had *issue two daughters by divers women, and died seised*; the daughters entered and took the profits many years, and before admittance the eldest daughter died without issue, and afterwards the youngest was admitted to the whole land, as sole heir to the father. In this case it was holden, that the possession of the eldest daughter, though before admittance, should make her sister, though of the half blood, inheritable to the land. Supplement. to Co. Comp. Cop. 71. f. 5. cites Dy. 25. 12 Eliz.

2. If a copyholder has *issue a son and a daughter by one venter, and a son by another venter, and dies, and a guardian is admitted*, this is possessio fratris of the eldest son to make the brother [sister] heir; but if the custom be, that the lord may, during the nonage of the heir devise [demise] it by copy to a stranger, this is not possessio fratris of the eldest. Dal. 110. pl. 1. 16 Eliz. Anon.

[192] 3. Husband and wife, seised in the right of his wife of certain customary lands in fee; he and his wife by licence of the lord make a lease for years by indenture, rendering rent, having *issue two daughters*; the husband dieth; the wife takes another husband, and they have *issue a son and a daughter*; the husband and wife die; the son is admitted to the reversion, and dieth without issue. It was holden by Manwood, that this reversion shall descend to all the daughters, notwithstanding the half-blood; for the estate for years which is made by indenture by licence of the lord is a demise and lease, according to the order of the common law, and according to the nature of the demise, the possession shall be adjudged, which possession cannot be said possession of the copyholder, for his possession is customary, and the other is mere contrary, therefore the possession of the one shall not be said the possession of the other, and therefore there is no possessio fratris in this case; but if he had been guardian by the custom, or this lease had been made by surrender, there the sister of the half blood should not inherit; and Mead said, that the Case of the Guardian had been so adjudged; Mounson to the same intent; and if the copyhold descend to the son, he is not copyholder before admittance, but he may take the profits, and punish trespass &c. 3 Le. 69, 70. pl. 106. Mich. 20 Eliz. C. B. Anon.

If the lease for years determines, and the elder brother dies before entry, the younger brother shall inherit; for when he had once got possession, which he had by the possession of his lessee for years, then it seems he has made the estate descendible to him and his heirs

heirs. Gilb. Treat. of Ten. 150. cites Supplement to Co. Comp. Cop. 114. — But perhaps it will be said, that the possession of the lessee for years is only the possession in law of the brother, and not in fact, because he can get no possession, and it would be inconvenient to carry the estate to another family, if the elder brother die before entry, but when this estate for years is ended, then since he may get a possession by entry, it is required by law; but then on the other hand, if by the possession of the lessee for years, he had no estate defendible to him and his heirs, how comes this estate to be devised by the expiration of the lease for years? It is urged on the other hand, that possession was but feigned, and is now gone; but yet, if the brother were once in possession, and then were disseised, it seems the sister should inherit though the possession of the elder brother were gone; but the possession of the lessee was the brother's possession only, by supposition of law, to help him out where he could get no possession, and therefore when that estate for years is gone, the law removes the assistance it gave before, because now he may get possession, and so sets the matter between the brothers, as it would if there had been no lease for years. Ideo quære de hoc. Gilb. Treat. of Ten. 150, 151.

4. A copyholder of inheritance of the Manor of Fulham had issue a son and a daughter by one venter, and a daughter by another venter, and died, his son being an infant of two months old, and the copyhold in lease by licence for 12 years, rendering rent; the death of the copyholder was presented, in the infancy of his son and heir; afterwards, (before any rent-day incurred, and any admittance or guardian assigned) the son died; and the question was, whether his sister of the whole blood shall inherit; and adjudged, that the eldest sister only is heir, and that the descent of the reversion, upon the lease for years, and before day of payment of the rent, is possessio fratris, quæ facit sororem esse hæredem. Moor 125. pl. 272. Trin. 23 Eliz. Rot. 1229. Anon.

Mo. 272. in pl. 425. Fenner said, that possessio fratris by entry before admittance had been allowed and adjudged in a case in 23 Eliz. in C. B. argued much between Alderman

Dixey and others. — D. 291. b. Marg. pl. 69 cites 23 Eliz. Rot. 1229. HOLMES v. MAYNELL, adjudged that the possession of a termor shall be the possession of the brother without any admittance; for the feisin given to his ancestors for him and all his heirs, but he is not tenant to the lord till he is admitted. — 4 Rep. 21. a. pl. 1 Mich. 23 & 24 Eliz. C. B. Brown's Case, S. P. and seems to be S. C. and resolved. — Ibid. 22 b. the third resolution, that where the customary estate of inheritance descends to the heir, he may enter and take the profits before admittance, and that there shall be possessio fratris before admittance upon actual possession, as in the case at bar, [where the father had made a lease for years, as in the principal case.] — But in a like case, where the son was admitted to the reversion, and died without issue, Manwood held, that this reversion shall descend to all the daughters, notwithstanding the half-blood; for the estate for years, which is made by indenture by licence, is a demise and lease, according to the order of the common law, and the possession shall be adjudged accordingly, which possession cannot be said the possession of the copyholder; for his possession is customary; and the other is mere contrary, and so the possession of the one, shall not be said the possession of the other, and therefore there is no possessio fratris in this case; but if he had been guardian by the custom, or this lease had been made by surrender, there the sister of the half-blood should not inherit, and Mead said, that the case of the guardian had been so adjudged; and Mounson to the same intent; and if the copyhold descends to the son, he is not copyholder before admittance, but he may take the profits, and punish trespasses &c. 3 Le. 69, 70. pl. 106. Mich. 20 Eliz. C. B. Anon. — 4 Le. 38. pl. 103. S. C. in totidem verbis. — Ibid. 212. pl. 343. Pasch. 17 Eliz. C. B. S. C. in totidem verbis; sed adjournatur.

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5. If A. be seised of copyhold land on the part of his father, and of other copyhold land on the part of his mother, and thereof dieth seised, and his son and heir be admitted to it by one copy, and by one admittance, now if that son dieth without issue the copyholds shall descend severally, the one to the heir on the part of his father, and the other to the heir on the part of his mother &c. per Clench J. 3 Le. 109. pl. 158. Trin. 26 Eliz. B. R. in Case of Taverner v. Cromwell.

6. If a copyholder in tail have issue a son and a daughter, by one venter, and a son by another venter, and dies, and the son by the first venter enters, and dies, the son of the 2d venter shall inherit. Co. Comp. Cop. 59. f. 50.

7. If a copyholder in fee-simple have issue a son and a daughter by one venter, and a son by another venter, and dies, and the son by the first venter enters and dies, the land shall descend to the daughter; quia possessio fratris de feodo simplici facit fororem esse hæredem. Co. Comp. Cop. 59. f. 50.

8. If there be three brothers, and the middle brother purchases a copyhold in fee, and dies without issue, the eldest shall inherit, because the worthiest of the blood. Co. Comp. Cop. 59. f. 50.

10. If a man have issue a son and a daughter by one venter, and a son by another venter, the eldest son purchases a copyhold in fee, and dies without issue, the daughter shall have the land, not the younger son, because he is but of the half-blood to the other. Co. Comp. Cop. 59. f. 50.

11. If a man has a copyhold by descent on his mother's side, if he die without issue, the lands shall go to the heirs of the mother's side, and shall rather escheat than go to the heirs of the father's side; but if I purchase a copyhold, and die without issue, the land shall go to the heirs of my father's side; but if I have no heirs of my father's side, it shall go to the heirs of my mother's side, rather than escheat. Co. Comp. Cop. 59. f. 50.

12. If there be father, uncle, and son, and the son purchases a copyhold in fee, and dies without issue, the eldest shall inherit, and not the father, because an inheritance may lineally descend, but not ascend. Co. Comp. Cop. 59. f. 50.

13. If there be two copartners, or two tenants in common of a copyhold, and one dies, having issue, the issue shall inherit, and not the other, by the survivorship; but otherwise it is of two jointenants. Co. Comp. Cop. 59. f. 50.

Sid. 267. pl.
18. S. C.
adjudged.

14. Custom was, that after the father's death, if there was no son, the eldest daughter should have the lands for life only, and then the lands should remain to the next heir male that can derive by the males; and also, that the wife should hold for her life. Tenant dies, and leaves two daughters. Wife enters. Eldest daughter dies. Adjudged that the youngest daughter shall have the lands within the custom, for though she was not eldest at the death of her father, yet she was eldest at the death of her mother, and her estate was a continuance of the estate of the baron till her death, as in the Case of Frank-Bank. Lev. 172. Trin. 17 Car. 2. B. R. Newton v. Shafto.

[194] 15. The father being seised of a copyhold, had issue three daughters by his first wife, and two daughters and a son by his second wife, and surrendered to his three daughters for eleven years, remainder to his two daughters for five years, remainder to his three daughters by the first wife, remainder to his own right heirs;

Mod. 102.
pl. 8. S. C.
but not
clearly S. P.
—Ibid. 120.

heirs; the father died; the three daughters were admitted; the son died; after which the eleven years expired; adjudged, that the admittance of the three daughters was the admittance of the son in remainder as right heir, and so an actual seisin in him which made a *possessio fratris*, by which the copyhold descended to his two sisters of the whole blood to him, and not to all his sisters, as heirs to their father. 2 Lev. 107. Trin. 26 Car. 2. B. R. Blackburn v. Greaves. pl. 22. S. C. & S. P. adjudged accordingly.

16. W. R. was seised of copyhold lands that were *descendible secundum Gavelkind*, and the wife endowable of a moiety. W. has issue H. by one venter, and J. and E. by another venter; W. dies, the wife enters into a moiety; the two sons enter into the other moiety, and were admitted to the reversion of the wife's moiety; J. the son by the second venter dies; the wife dies. The question was, whether this admittance to the reversion shall so attach it in the brother, as that the sister shall have it before the half-brother; and it was argued, that she shall not; for it is found, that after the death of the father the mother entered, and so the son was never seised, so that this case is stronger than the case 1 Inst. 31. a. where the son enters, and endows the mother, and yet that shall so defeat his possession, that there shall be no *possessio fratris*. To which it was answered, that it being found that the son was admitted, it shall be intended according to the custom, and then the estate shall be guided by the custom, and not by the rules of common law; and he cited two cases, where the attaching of a reversion upon an estate for life doth seem to be a sufficient seisin to convey the land to the heir of him in whom the reversion was so attached, viz. 1 Cro. 411. Roll. Titt. Descend. 623. Godfrey v. Bullan. Vaughan said, all customs are contrary to the common law, and therefore shall be taken strictly, and here is *no custom that a reversion shall descend in Gavelkind*; and Atkins Justice said, that in those cases cited for the daughter, there was no maxim of the common law, as here is, viz. *possessio fratris &c.* and then he that takes advantage of it must be qualified, according to the common law. Judgment against the daughter def. nisi causa. Freem. Rep. 45, 46. pl. 55. Trin. 1672. Foxe v. Smith.

17. Since by custom an estate at will is descendible, the descent is ordered and governed by the rules of the common law; for those reasons, that govern the descents at common law, are drawn from the nature of descents and disposition of estates after the owner's death, and are grounded upon those reasons that seem to warrant such a disposition of the estate, and are not taken from the nature of the land or thing that is disposed of, and therefore may as well, and with as good reason, be applied to the disposition of a copyhold, as freehold estates, since it is not the nature of the thing disposed of, that is to rule or govern either in one case or in the other; and therefore where a * copyholder by licence made a lease for years, and the lessee entered, and the lessor died, having issue a son and a daughter by one
venter

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venter, and a son by another, then the eldest son dies, it was adjudged that the daughter of the whole blood should inherit, because the possession of the lessee for years was the possession of the elder brother, who may have possession before admittance, for in that case he was not admitted; for if it be reasonable in such case at common law to keep the inheritance out of the half-blood, so it is in copyhold estates; but if the brother do not get possession, the sister cannot inherit, for then he hath only a right to the lands as representative of his father, which right she is not capable of having, because she is not representative of the father; but when he has gotten possession, he hath then an estate in the lands descendible to him and his heirs; and the sister is his heir, and though he has the lands as representative of his father, yet he hath them to him and his own representatives; but when he never got possession, he never executed the power he had of taking the lands to him and his representative, so that this power devolves upon the younger son as representative of his father, for the law gives the estate to him and his representative, who is representative of the dead person. Now when he that is representative to the dead person, doth not get actual possession, and so vest the estate in him and his heirs, he hath no power over the lands, and therefore can make no lease or disposition of them by feoffment, because though he hath a right to be absolute owner of the lands, yet is he not actually so till entry, because till then in fact he hath no possession, and therefore there is no reason by a fiction of law to create him a possession; and so he never having had the lands to him and his representative, he must take who is representative to the dead person, which is the younger brother, and this also may be a reason why he that claims by descent, must make himself heir to him that was last actually seised of the freehold. Gilb. Treat. of Ten. 147, 148, 149.

(D. e) Disseisin. What is.

1. **NOTE**, it was holden by the Court, that *if a copyholder in fee dieth seised, and the lord admits a stranger to the land, who entereth, that he is but a tenant at will, and not a disseisor to the copyholder, who hath the land by descent, because he cometh in by the assent of the lord &c.* 3 Le. 210. pl. 274. Trin. 30 Eliz. in B. R. Anon.

* Lat. 199:
S. C. & S. P.
agreed.

2. *A lease for years by a copyholder* [without licence] although it be a forfeiture, yet it is no disseisin to the lord; agreed per Cur. Noy. 92. Trin. 2 Car. B. R. Ashfield v. Ashfield.*

(E. c) Dower. In what Cases the Feme shall have Dower. And how recovered.

1. **T**HE custom of a manor was; that the lord, or his steward, or deputy, might demise; the lord took a wife, and by his last will in writing gave authority to certain persons to make leases, according to the custom of the manor, to raise fines for payment of his debts, and died; they held court in their own names, and granted copies in reversion, according to the custom; afterwards the widow of the lord recovered a 3d part of the manor in dower, and one of the copyhold estates, whereof the reversion was granted, was assigned to her by the sheriff, to reher with other lands, by writ &c. The Court held, that she should avoid the grant made by the persons assigned by the will. D. 251. pl. 89. Hill. 8 Eliz. Anon. [196]

2. If the lord of a manor where customary tenements are demised and demisable by copy &c. according to the custom of the said manor, for one, two, or three lives, grants a copyhold for three lives, and takes a wife, and the three lives end, and the lord enters and keeps the lands for a time in his own hands, and afterwards grants them over again by copy, and dies, the copyholder shall hold the land discharged of dower of the lord's widow; per Wray, who said, that this is a clear case; for the copyholder is in by the custom, which is paramount the title of dower and seisin of the husband; and judgment accordingly. Le. 16. pl. 19. Pasch. 26 Eliz. B. R. Cham v. Dover.

3. If a feme be endowable of a copyhold by custom, it was the opinion of the Justices that a lease made by the baron by the custom after the espousals, shall precede the dower, and the dower shall not avoid it. Mo. 758. pl. 1047. Trin. 2 Jac. Holder v. Farley.

for the lessee comes under the custom, and by the lord's licence as well as the feme. Cro. J. 36. pl. 13. Farley's Case, S. C. ——— Gilb. Treat. of Ten. 303. cites S. C. but says, that if the lease was made without warrant she may avoid it; and that it seems to him, that the feme shall not in this case be endowed of the 3d part of the rent and reversion, because customs ought to be strictly pursued, and that is only to be endowed of land; yet it seems after the lease ended she shall be endowed, for the husband did die seised (the possession of his lessee being his own possession) but it was agreed in this case, that by special custom the feme might avoid the lease. This, among other cases, proves that a copyholder may dispose of his land, and bar his wife of her free-bench, unless there be a particular custom that he shall avoid any alienation &c. made by him, for then the particular custom shall, as it seems, avoid his charge, as well in the case of copyhold, as freehold estates, by the common law.

4. The custom of a manor was for the widow to be endowed of a moiety of the copyholds of which her husband died seised; the husband died seised of 100l. per annum and his wife was endowed of 50l. per annum, and the 50l. per annum descended to his heir, who afterwards died, leaving a widow. This second widow shall be endowed of a moiety of the moiety, and so shall

Supplement to Co. Comp. Cop. 79. f. 13. cites S. C. resolved. — 8 Rep. 63. b. S. C. cited per Cur. as adjudged and affirmed for good law per tot. Cur.

She being in of her widow's estate shall not avoid the lease without an especial cus-

Lev. 154. S. C. is a different point. — Sed 76. pl. 9. S. C. but not S. P. — a Sid.

1. S. C. but shall have 25l. per annum; adjudged. Raym. 58. Mich.
not resolv- 14 Car. 2. B. R. Baker v. Berisford.
ed.—Ibid.
9. S. C.
Glyn Ch. J. held that the second widow was intitled to a moiety.

5. An *ejectment* will not lie for a third part of a copyhold tenement in nature of dower, for they ought to levy a *plaint in nature of a writ of dower in the manor court*, and the homage to sever, and set out the same; but if the custom had been for the widow to have the third part not in nature of dower, but in common with the heir, it were then otherwise; ruled per Pemberton Ch. J. at the assizes. 2 Show. 184. pl. 188. Hill. 33 & 34 Car. 2. B. R. Chapman v. Sharpe.

[197] (F. c) Entails by the Statute De Donis &c.

1. **NOTE**, it was said for law that tail may be of a copyhold, and that *formedon* may lie of it in *descender by protestation in nature of writ of formedon in descender at common law*, and good per omnes justiciarios; for though *formedon* in descender was only given by statute, yet now this writ lies at the common law, and it shall be intended that this has been a custom there time out of mind &c. and the demandant shall recover, by advice of all the Justices. Br. Tenant per Copie, pl. 24. cites 15 H. 8.—And the late matter in Effex M. 26 H. 8. and Fitzherbert affirmed this after in Camera Ducat. Lancast. & concordat. Littleton in his Chapter of Tenants by Copy of Court Roll. Ibid.

2. The Court were clear in opinion that a copyhold could not be entailed without such a custom to entail it. Mo. 188. pl. 336. Trin. 27 Eliz. Br. Hill v. Morfe.

3. A *surrender* by tenant in tail is no discontinuance unless the custom is so, and though it was moved that there can be no estate tail of a copyhold except it be shewn that the lands had been given so, and always enjoyed by the remainder-men and reversioners, and that their alienations did not use to bind &c. for otherwise it shall be intended a fee, yet the Court held the contrary, that it shall be intended an estate tail, and so always used. Cro. E. 148. pl. 17. Mich. 31 & 32 Eliz. B. R. Bullen v. Grant.

Le. 174.
175. pl.
244. S. C.
& S. P.
held by
Wray ac-
cordingly.
—Sup-
plement to
Co. Comp.
Cop. 77.
f. 11. cites
S. C. held
by Wray that it was an estate tale, and not a fee conditional, and that customary lands may be granted in tail.

Popham &c.
33. Grave-
nor v. Brook
S. C.—

4 Rep. 23.
2. pl. 5.
Gravenor
v. Dod S. C.
adjudged

4. Per Gaudy and Clench J. an estate cannot be of a copyhold by the statute, but may by use and custom, but per Popham and Fenner J. contra, that there may be an estate tail by the statute, per equitatem rationis, but it cannot be by custom. Cro. E. 307. pl. 9. Mich. 35 & 39 Eliz. B. R. Gravenor v. Rake.

that whether it be fee simple condition or estate tail it is within the custom. ——— If it is not

an estate tail it is a *conditional fee*, and so it was agreed by us all, in the case of *Gravenor v. Rake*, per Cur. Cro. E. 373. pl. 20. Hill. 37 Eliz. B. R. in case of *Stanton v. Barnes*.
Copyhold may be entailed by equity of W. 2. without custom, and is not entailed by custom. Mo. 538. pl. 488. adjudged *Deil v. Higden*.—Upon a special verdict the question was, whether a copyhold could be entailed *without laying a special custom* for so doing, and adjudged, per tot. Cur. that it might, and Holt Ch. J. rejected the notion of Lord Coke about the *statute de donis co-operating with the custom*, and held that the statute turns all those estates which at common law were fee-simple conditional into *estates tail*. 11 Mod. 199. pl. 17. Mich. 7 Ann. B. R. *Adams v. Hinclo*w.

5. The custom of a manor is, *that a copyhold estate may be granted in fee-simple*: in that case it was adjudged, that *an estate thereof granted to one and the heirs of his body is good, and within the custom*; for *ubi licet quod est majus, non debet quod est minus non licere*. Supplement to Co. Comp. Cop. 81. f. 16. cites 4 Rep. 36 Eliz. *Gravenor v. Tedd*.

Poph. 33. *Gravenor v. Brooke* & al' S. C. adjudged accordingly.

6. When a copyholder in fee makes a gift in tail with remainder over in tail, *no reversion is left in him, but only a possibility*, and the lord ought to avow upon the donee, and not upon the donor; and there is a difference when he makes or gives an estate of inheritance, and when he makes an estate for life or years; for in the one case he has a reversion, but not in the other. 2dly, A recovery without a special custom shall not be, as was agreed in the Case of the Manor of Stepney, because the warranty cannot be knit to such an estate without a custom, per Harvey J. Godb. 368. cites it as adjudged in the C. B. 17 Eliz. in Case of *Lane v. Hill*.

And that if they were within the statute W. 2, the lord could not enter for felony, but the donor and the services should be done to the donor, and not to the lord of the

manor: per Harvey J. Ibid. cites Pasch. 35 Eliz. C. B. *Pit v. Hockley*.—Supplement to Co. Comp. Cop. 77. f. 11. cites S. C. but says the contrary was resolved, in case of *Borneford v. Sir John Packington*.

7. W. W. being seised of a copyhold of inheritance, surrendered it to the use of his last will, and having a daughter then born, and his wife being with child, he devised part of his lands to the child in ventre sa mere, & hæredibus suis legitime procreatis, the residue to his daughter born, and to the fruit of her body, and if she die without fruit of her body, then to remain to the child in ventre sa mere &c. and willed that one should be heir to the other; afterwards the wife was delivered of a daughter &c. All the Court agreed, that this was an estate-tail in the after-born daughter, for the words hæredibus suis &c. and that one should be heir to the other, makes it an estate-tail without the word (body) in a will. Mo. 637. pl. 877. Hill. 37 Eliz. *Church v. Wyat*.

Supplement to Co. Comp. Cop. 86. f. 21. cites S. C.

8. In ejectment for copyhold lands held of the Manor of Thistleworth, it was resolved by all the Justices, that *there cannot be an estate tail* of such lands, unless there is a special custom within the manor to warrant it. Cro. E. 717. pl. 43. Mich. 41 & 42 Eliz. C. B. *Erish v. Reeves*.

S. C. cited per Cur. Godb. 368. pl. 458. Mich. 2 Car. C. B. —S. C. cited Gilb.

Treat. of Ten. 155. and 159.

9. A copyholder in fee surrendered to the use of one in tail with diverse remainders over, who was admitted, and afterwards

Gilb. Treat. of Ten 158. 159. cites

S. C. where it is doubted, whether a copyhold may be entailed no custom being found one way or the other; by which it seems

wards surrendered to the use of another in fee, against whom a recovery was had in the copyhold court, who vouched the common vouchee; question, 1st, *Whether intail might be of a copyhold, there being no custom found?* 2dly, *Admitting that; whether a surrender by itself be a discontinuance?* 3dly, *If there may be a common recovery of a copyhold to bar the tail, and those in remainder?* not resolved. Cro. E. 907. pl. 18. Mich. 44 & 45 Eliz. B. R. Barry v. Sanderfon.

plain, that if there had been a custom found, there had been no question, that it might have been intailed; but then there is the case of *ERRISH v. RIVZS* that an entail may be of a copyhold by custom, but not without it; there are several other cases warrant the same distinction, as Cro. E. 307. *Gravenor v. Rake* and 149. *Heddi v. Chalener* 1 Le. 175. *Bulleyn v. Graunt*. Poph. 128. *Rawlinson v. Green*. 1 Sid. 268. 314. *Newton v. Shaftes*. Mo. 637. *Church v. Wyat*.

10. 36 Eliz. in the King's Bench, it was adjudged, that *where the custom of a manor was, that lands might be granted unto any in fee-simple, in such case a grant of lands unto a man and the heirs of his body was within the custom*; for a custom which extendeth to the greater will extend to the lesser estate. Supplement to Co. Comp. Cop. 77. f. 12.

11. *Whether copyhold lands are within the Statute Westm. 2. cap. 1. De Donis &c. or may be entailed, hath been much controverted*, and many judgments and resolutions have been on both sides, and it seemeth to be a point not fully agreed upon at this day; I shall therefore make some little mention what hath been said on either side, and leave it to the judgment of others; and first for the affirmative part, that copyholds are within the said statute and may be intailed, I shall begin with Mr. Littleton himself; Tenant by copy of court-roll is, saith he, where there is a custom of a manor time out of mind used, that certain tenants within the said manor have used to have lands and tenements to them and their heirs in fee-simple or in fee-tail, and in that chapter he particularly sets forth the manner of grants of such estates, viz. *Ad hanc curiam venit A. de B. & sursum-reddidit in manus domini &c. unum mesuagium &c. ad usum C. & D. & hæredum suorum, vel hæredum de corpore suo exeunt. habendum sibi & hæredibus de corpore suo exeunt. &c.* by which it appeareth to be the opinion of Littleton, that an estate-tail may and might be of copyhold lands, and herewith agreeth the opinion of Mr. Plowden, in his Commentaries in Morgan and Manxell's Case; but note, that the opinion of Mr. Littleton is, that there must be a custom of the manor to enable such estates of copyhold lands. Supplement to Co. Comp. Cop. 76, 77. f. 12.

12. It is said in 3 Rep. in *HEYDON'S CASE*, that where an act of parliament doth alter the service, tenure, or interest of the estate, either in prejudice of the lord or of the custom of the manor, or in prejudice of the tenants, there such an act of parliament doth not extend to copyholds, and therefore the Statute of Westm. 2. *De Donis*, because it extendeth to

As to the alteration of the service and tenure of the land, and is prejudicial to the lord of the manor, doth not extend to copyholds; but in that case it is agreed, that *by a special custom* lands might be entailed, for that it might be, that upon the creation of the manors, lands were given by lords of manors, to hold by their tenants by particular services, and for particular uses &c. to some, to them, and their heirs in fee-simple; to some others, to hold to them and the heirs of their bodies begotten; and to some others for particular estates, as for life &c. and such estates having continued in their issues time out of mind, custom hath now enabled such estates to be of copyholds in tail; and although they have and enjoy such their estates, be it either fee-simple or fee-tail, yet it is but *secundum consuetudinem manerii*, and therefore and for these reasons and causes, *although that copyhold be not, or could not be entailed within the general words of the statute De Donis &c. yet by custom time out of mind used, they say that copyholds may be entailed.* Supplement to Co. Comp. Cop. 77. f. 12.

13. A custom, within a manor time out of mind of man used, was to grant certain land, parcel of the said manor in fee-simple, and never any grant was made to any and the heirs of his body for life, or for years; and the lord of the said manor did grant to one by copy for life; the remainder over to another, and the heirs of his body; and it was adjudged, that the grant and remainder over was good, for the lord having authority by custom, and an interest withal, might grant any lesser, omne majus continet in se minus; but he that hath but a bare authority, as he that hath a warrant of attorney, must pursue his authority, (as hath been said) and if he do less it is void. Co. Litt. 52. b.

Supplement to Co. Comp. Cop. 81. f. 16. cites S. C. accordingly. — Cro. E. 373. pl. 20. Hill. 37 Eliz. B. R. Stanton v. Barnes; The custom was to grant it in fee or for life

ea capienti extra manus domini; a surrender was to the use of one for life, remainder in tail, remainder in fee; it was objected, that this was not good to him in the remainder in tail, the custom being found expressly, that it shall be *solummodo ea capienti extra manus domini*; it ought to be an immediate taking, and he shall not take by way of remainder; also the custom will not warrant any estate for life or in fee; but the court resolved to the contrary, that it is good enough; for in that it is limited to one, and the heirs of his body, it is not void; but if it be an estate tail, it is a conditional fee, and so it was agreed by us all in the case of GRAVENOR v. RAKE; for when a custom warrants the greater, it shall warrant the lesser also; to the d. it may be well limited by way of remainder, as well as to the immediate taker; for when the custom warrants it, it cannot restrain a fee to be limited as well by way of remainder as otherwise, and he in remainder and the particular tenant make but one estate, and in that it is found that the custom is, that it shall be granted *solummodo ea capienti*, it is void therein, wherefore it was adjudged accordingly for the plaintiff.

14. In ejectment the case was, that *tenant in tail of a copyhold surrendered the same into the hands of the lord, to the use of J. S.* Doderidge J. said it had been a great doubt, whether it may be entailed, but the common and better opinion was, that by the Statute *De Donis co-operating with the custom it may be*, and with this agrees HEYDON'S CASE, and so was the opinion of the Court. Poph. 128. Mich. 5 Jac. B. R. Lee v. Brown.

[200] Supplement to Co. Comp. Cop. 77. f. 11. cites S. C.

Cro. C. 48. 15. Copyholds are *not within the Statute De Donis*, which speaks only *de tenementis per chartam datis*. &c. nor are they within the meaning of it. 1st. Because they were not until 7 E. 4. 19. of any account in law, they being but estates at will. 2dly. The Statute of W. 2. provides only against those who might *make differisin by fine or feoffment*, which copyholders could not do. 3dly. Because if copyholders might give lands in tail by the statute, then *the reversion should be left in themselves*, which cannot be. 4thly. The makers of the statute intended nothing to be within the statute *of which a fine could not be levied*, for it provides *quod finis ipso jure sit nullus*. 5thly. Great mischiefs might follow if copyholds should be within the Statute W. 2. because there is *no means to dock the estate*, and no customary conveyance can extend to a copyhold created at this day. Adjudged. Godb. 367. pl. 458. Mich. 2 Car. C. B. Roydon v. Malster.

Rep. 383. — 2 Roll. — Sup-
Mich. 21. plement to
Jac. C. B. Co. Comp.
the S. C. Cop. 77. f.
adjournatur. 12. S. C.
— S. C.
cited by
Glynn Ch.

J. 2 Sid. 73, 74. — It is made an *objection against entailing copyhold lands*, that thereby the donee must hold of the donor, and the donor being in the reversion, must hold of the lord, and so the change of tenants will not be so often, and if the donee commit any forfeiture, the donor must take advantage of it, which would be to the prejudice of the lord to have the tenure thus altered; to this objection I think it may be very well answered, that the truth of the case is not so, for the donee in tail *doth not hold of donor, but of the lord*, as it seems every tenant for life doth of a copyhold, and this seems to be very reasonable; for a copyhold in fee-simple is not like other estates in fee-simple at common law, but they are only estates at will, and so he that is the actual tenant at will is tenant to the lord; for it seems to me, that because they are but estates at will, there is a division of estates, but he that is actual tenant at will, hath all the estate, and there is no part or parcel of the estate left in any body else, and that a tenant in fee-simple of copyhold lands is only he that hath such an estate at will in the lands, as by the custom of the manor, is not to determine by his death, but that after his death his heir shall be tenant at will, so that when he grants away an estate for life, he has no estate in the lands left in him, but only a power of being tenant at will, according to the custom of the manor, when his tenant for life's estate is ended; and I take it, that in the mean time the tenant for life is tenant at will to the lord, and shall do the services; and if he commit a forfeiture, the lord shall take advantage of it, and to this purpose is the case of *BORNFORD v. PACKINGTON*, where the custom of the manor was, that the widow should have her free bench; and it is there taken for granted that he shall hold of the lord, and he accordingly admitted tenant, and that the heir shall not be admitted during her life, which plainly proves, that the course of tenure of copyhold lands, is not like the tenure of freehold lands at common law, for in that case at common law, she should hold of the heir; and though in estates at common law, the donee holds of the donor by the same services, the donor holds over, because the statute creating a reversion in the donor, the judges made exposition according to the common law, that because a fee-simple conditional was held of the feoffor by the same services that he held over, therefore the donee should hold of the donor by the same services he held over, but at common law the tenant in fee-simple conditional of copyhold, could hold of no body, but of the lord, therefore they cannot hold of the donor that have now an estate tail in copyhold lands, but according to the rule in expounding the statute De Donis, viz. by the common law, they must hold of the lord, because the tenant in fee-simple conditional of copyhold lands at common law, held of the lord, and not of the surrendoror. Gilb. Treat. of Ten. 159, 160, 161.

16. There is not any book in the law, but only *MANXELL'S CASE* in Plow. Com. that the *Statute of Westm. 2.* extends to copyholds, per Hatvey J. Godb. 369. at the end of pl. 458. Mich. 2 Car.

Gilb. Treat. of Ten. 156. cites S. C. and says, that it seems the meaning is this, that estates tail

17. A copyhold may be entailed; not entailed, as within the Statute of Westm. 2. nor by virtue of any construction of the Statute of Westm. 2. but there *may be such an estate before Westm. 2. of a copyhold, which was a kind of base estate, and which might be grantable to one and the heirs of his body, according to the custom*, and if he died without issue it might be aliened

aliened again, and that a copyholder could not bar his issue unless by a recovery. I conceive such an estate might be by custom, per Bridgman Ch. J. in delivering the resolution of the Court. Cart. 22. Pasch. 17 Car. 2. C. B. Taylor v. Shaw.

were before the statute as to the manor of limitation by the cus-

tom of some manors, as that an estate was granted to a man and the heirs of his body begotten, the remainderer to another, but that in other respects these estates were not estates tail before the statute, as that the tenant should no ways alien to debar his issue, or them in remainder, or that if he made any discontinuance, they should have a formedon in descender or remainder, but these things were introduced by the statute upon the estate, which was the same in limitation by the common law, and so the statute is said to co-operate to make an estate tail, and this obviates the main objection against intailing copyholds by the statute, viz. that every copyhold estate ought to be grantable time out of mind, and if an estate tail were introduced by the statute, then that estate was not grantable time out of mind; for if the estate tail were before the statute the same in point of limitation of the estate, as it is now since the statute, then an estate tail has always been grantable time out of mind, though some other qualities are now annexed to that estate by act of parliament, which were not so before, and which may well be said to give the statute some share in the making these estates, since they are so very considerable; and that the qualities should be annexed to this estate by the statute De Donis, is no ways unreasonable, for this act was made to redress a wrong at common law; and was for the general convenience and profit of the weal publick, and bringing an estate in copyhold lands within the statute De Donis, is no prejudice to the lord or tenant, alters no tenure, estate, or custom of the manor, which may any ways prejudice any body.

18. Justice Powys said it was a point before him upon the circuit, whether a copyhold could be entailed within the Statute of W. 2. unless the custom of the manor did warrant it; and it being said by the counsel that C. J. Holt was of an opinion that this statute did extend to a copyhold, a case was agreed on &c. Ch. J. Parker to this said, that *if the constant use of a manor had been to alienate after issue as at common law, without having any remainder over, and such alienations had been always good*, it would be pretty hard to extend the statute to such estates. Mich. 12 Ann. B. R.

19. Gilb. Treat. of Ten. 155. says, that the cases which he had before mentioned [as that of Heydon's Case, Rowden v. Malster, Erish v. Reeves, Gurrey v. Sanderson, Dell v. Higden, Clun v. Pease, and Otlery Monastery's Case.] are all the laws he can find against entailing copyhold lands, none of which go so far as to say, that if there have been an estate tail by custom, that it is not within the Statute De Donis, but only the opinion of my Lord Ch. B. which will be but of little weight, when we have seen the precedents against this opinion, which I shall now examine; and first, there is Littleton's opinion for the entailing of a copyhold, for he says, that tenant by copy of court roll is, as if a man be seised of a manor, within which manor there is a custom which hath been used time out of mind, that certain tenants within the same manor have used to have lands and tenements, to have and to hold to them and their heirs in fee-simple, or fee-tail, so that there he says expressly, that estates-tail in copyholds have been time out of mind, and therefore must have been before the statute; but Lord Coke, in his Comment. on Littleton, in another place says, that an estate tail may be, by the opinion of Littleton, by the custom, the statute co-operating with it, for, saith he, there can be no estate tail

in copyholds by custom only, nor no estate-tail by the statute only, but *the statute must co-operate with the custom*. Now the question will be, how this can be reconciled with what *Lit-leton* says? for he says, *that an estate tail in copyholds was time out of mind of man, and then if estates-tail were before the statute, the question is out of doors, whether a copyhold can be entailed by force of the statute; for if they were entailed at the common law, then as to them the statute is but an affirmance of the common law*.

- [202] 20. Those that are against the entailing copyhold lands, say that the estate tail of copyhold land, mentioned by *Lit-leton*, must be understood a *fee-simple conditional* at common law, or else he contradicts himself; for he says in another place, that all inheritances at common law were fee-simple, but that may be well enough understood of freehold estates; for *one may lay a general rule for all lands, meaning freehold lands, which will not extend to copyhold lands*. *Gilb. Treat. of Ten.* 158.

(F. c. c) Entails. By what Words.

Cro. C. 366. 1. A. Surrendered to B. and C. and the longest liver of them, pl. 4. S. C. and for default of issue of the body of C. then to the adjudged. youngest son of M. the sister of C. Resolved, that the words — S. C. (of default of issue of the body of C.) does not give him an cited *Gilb.* estate tail by *implication*, having an *express estate before*, but *Treat. of* was expressed to shew the commencement of the remainder *Ten.* 144. to the youngest son of C's sister. *Jo.* 342. pl. 1. *Trin.* 10 *Car.* B. R. *Seagood v. Hone*.

2. A surrender was to A. for life, remainder to B. and his *Salk.* 620. wife, and their heirs and assigns, and for default of such issue, pl. 3. S. C. held ac- remainder over; per tot. *Cur.* except *Gould J.* this gives B. cordingly. and his wife a fee-simple; but *Gould* held it gave only — *Ld.* estate tail. 11 *Mod.* 57. pl. 34. *Pafch.* 4 *Ann.* B. R. *Idle* *Raym. Rep.* v. *Cook*. 1144. to 1154. S. C. adjudged, and the arguments of the judges at large.

3. Surrender was to the use of himself for life, remainder to his wife for life, remainder to the heirs of their bodies; there was no admittance pursuant to this surrender; the son shall have a fee-simple, for his father's estate continued in the same plight. 11 *Mod.* 107. pl. 5. *Mich.* 5 *Ann.* B. R. *Brown v. Dyer*.

This in Roll
is letter (B)
in fol. 506.

[G. c] Copyhold Docked. [Bar of Entails.]

* *Poph.* [1.] If it be admitted that there may be an estate tail of a 128, 129. copyhold by the custom co-operating with the Statute S. C. an De Donis, yet this may, by the custom of the manor, be estate tail of barred by a surrender, for as the custom creates it, so the custom may a copyhold may

may ar it. Mich. 15 Jac. B. R. between † *Lee and Brown*, resolved per Curiam, upon evidence at the bar. Et Pasch. 16 Jac. B. R. in the same case, resolved again, upon evidence at the bar. Trin. 29 Eliz. between * *Hill and Upchour*, cited, Co. Lit. 59. b. [60. b.]

cannot be barred by a surrender without a special custom for that purpose, and to maintain such custom, it ought to be shewed, that a formoden had been brought upon such surrender, and judgment given, that it does not lie. Yet it was agreed, that it was a strong proof of the custom, that they, to whose use such surrenders had been made, had enjoyed land against the issues in tail.

† 2 Brownl. 121, 122. *Hill v. Upchurch*, Mich. 9 Jac. C. B. S. C. Coke Ch. J. said, that it was adjudged in 27 Eliz. for the manor of North-Hall in Essex, that admitting a copyhold may be intailed by the statute, then a custom that a surrender shall be a bar or discontinuance of such estate is good for the reason above. — Supplement to Co. Comp. Cop. 78. f. 12. cites S. C. and also Trin. 38 Eliz. *Field v. Elliot*, that a surrender by tenant in tail of a copyhold in fee makes a discontinuance; but says, that notwithstanding those authorities and cases, he conceives, that a surrender is no discontinuance of a copyhold estate in tail.

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[2. If it be admitted that there may be a tenant in tail of a copyhold, yet this may be barred by a common recovery, for a warranty may be annexed upon this by a surrender to an use, or by a confirmation or release with warranty; and it may be intended, that he shall have another copyhold in value, and also in favour of common recoveries. Dubitatur, 37 Eliz. B. R. between *Dell and Higdon*. Mich. 43, 44. Eliz. B. R. Morris's Case, per Curiam, without any custom to warrant it.]

Cro. E. 279. pl. 17. S. C. the jury found quod nunquam antea videbatur talis recuperatio in curia manerii prædicti. The

court upon the motion seemed to think that it should bind the remainder, but they spake not much thereto; sed adjournatur. — 4 Rep. 23. a. pl. 3. *Deal v. Rigden* S. C. adjudged, that where by custom of a manor plaintiffs have been made in the court of the manor in nature of real actions, if a recovery be had on such plaint against tenant in tail, (admitting that copyhold lands may be entailed) it is a discontinuance, and shall bar the heir in tail; for such plaintiffs being warranted by the custom, it is an incident which the law annexes to such a custom, that such recovery shall make a discontinuance. — Mo. 358. pl. 488. S. C. resolved, that a common recovery without voucher is discontinuance, and so is a common recovery with voucher by tenant in tail of a copyhold; and if tenant in tail comes in as vouchee, this bars the issues and remainders, though no custom ever was for recoveries in the court of the manor. — Supplement to Co. Comp. Cop. 78. f. 12. cites S. C. — A recovery does not dock the remainder without a custom; per *Twissden J. Raym.* 164. Mich. 19 Car. 2. B. R.

* A surrender with warranty to an use, and a grant accordingly, makes the party in en le per by the surrendoror, and upon this warranty the surrendoror may be vouched in the court upon plaint there, and the recovery in value shall be only of other copyhold land within the manor; Adjudged. Mo. 358, 359. S. C. — A warranty cannot be annexed to an estate tail of a copyhold; per Car. Cro. E. 380. pl. 32. *Hill* 37 Eliz. C. B. *Eylet v. Lane*; but the reporter adds a quære. — See *Clun v. Pease*, pl. 10. *Infra*.

3. If copyholder in tail surrender to the use of another in fee, and a copy is made to the other accordingly, this shall be a discontinuance, for by livery, or other way, he cannot depart from the land, and this way which he may use shall be to him of equal benefit, as livery shall be to him that can make it, Arg. Pl. C. 233. 4 Eliz. in Case of *Willion v. Berkley*.

4. The case was, baron and feme, copyholders, to them and their heirs, and the baron in consideration of money paid by him to the lord obtaineth an estate of the freehold to him and his wife, and to the heirs of their bodies; the baron dieth, having issue; the feme enters a common recovery, and his heir enters by the Statute 11 H. 7. and agreed the entry was lawful, for

Supplement to Co. Comp. Cop. 73. f. 8. cites S. C.

the copyhold by the acceptance of the new estate was extinguished. Cro. E. 24. pl. 3. Hill. 26 Eliz. C. B. Stockbridge's Case.

5. A copyhold was surrendered to the use of another in tail, and the surrenderor [surrenderer] had issue 3 daughters, and died. One of the daughters surrendered in fee; agreed, that if this was only a possibility, it could not be conveyed to another by a surrender; Arg. Roll. Rep. 318. cites 33 & 34 Eliz. B. R. Gravenor's Case.

Cro. E. 373.

pl. 20.

S. C. — S. C.

cited per

Cur. Godb.

368. in pl.

458. —

A copyhold

was surren-

dered to the

use of copyholder's will, who devised it to J. in tail, remainder to H. in tail &c. J. hath issue, and

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surrenders to the use of his wife for life; it was adjudged, that since the jury found it

was not the custom of the manor to have an estate tail in a copyhold, that J. had a

fee-simple conditional, and that by his having of issue, he had performed the condition, and the

surrender to the use of his wife was good. Gilb. Treat. of Ten. 154, 155.

6. A surrender of copyhold lands was made within the manor of Stevenson, to the use of J. S. and the heirs of his body; and after issue, he surrendered the lands unto another. It was agreed by all the Justices, that it was a fee-simple conditional at the common law, and after issue, that he might alien the lands. Supplement to Co. Comp. Cop. 77. f. 12. cites Hill. 34 Eliz. B. R. Stanton v. Barney.

* Supplement to Co. Comp. Cop. 78. f. 12. cites S. C. adjudged.

7. An infant [*tenant in tail] surrendered copyhold to the use of a stranger, who was admitted. The infant may enter at his full age, because this is no bar nor discontinuance. Mo. 597. pl. 814, Hill. 35 Eliz. Gooles v. Crane.

Supplement to Co. Comp. Cop. 78. f. 12.

8. A surrender of copyholder in tail is no discontinuance; agreed. Mo. 358. pl. 488. Trin. 36 Eliz. Dell v. Higden.

S. C. and S. P. and says, that according to this it was adjudged 37 Eliz. in case of Gravenor v. Brooks. — Brownl. 36. S. P. held accordingly by Coke Ch. J. and Foster J. of the same opinion, in case of Rogers v. Powell. — S. P. accordingly, and that it is no bar to the entry of the issue in tail, and so was it holden in the Sergeants Case, when Audley, who afterwards was made chancellor of England, was made Serjeant; and afterwards it was adjudged, that the entry of the infant was lawful. Le. 95. pl. 124. Hill. 30 Eliz. B. R. Knight v. Footman.

Supplement to Co. Comp. Cop. 78. f. 12. cites S. C. that copyhold lands were entailed, and the copyholder surrendered the said lands to the use of another man in tail with divers remainders over, and then he died, it was said in this case, that it

9. A surrender was unto the use of one in tail, with divers remainders over in tail; the 1st surrenderee died without issue; and first it was agreed and adjudged, that it was no discontinuance. 2dly. If it were a discontinuance, yet a formedon in the remainder did not lie, because there ought to be a custom to warrant the remainder as well as the first estate tail; for when a copyholder in fee maketh such a gift, no reversion is left in him, but only a possibility, and the lord ought to avow upon the donee, and not upon the donor; and there is a difference when he makes or gives an estate of inheritance, and when he makes a lease for life or years; for in the one case he hath a reversion, in the other not. 3dly. A recovery shall not be without a special custom as it was agreed in the case of the Manor of Stepney, because the warranty cannot be knit to such an estate without a custom. Godb. 368. pl. 458. cited by Harvey J. as adjudged 37 Eliz. C. B. in the Case of Lane v. Hill.

case, that it was no discontinuance of the tail, but the issue in tail, notwithstanding the surrenderer

sunder might enter. But it was said in that case, that if it were a discontinuance, that in such case the formdon in the reverter did not lie by the tenant in tail, because when a copyholder makes a gift in tail, he has no reversion but a possibility; and the lord shall avow upon the donee for the rents and services, and not upon the donor.

10. In trespass it was found, that the land was copyhold demisable in fee, in tail, or for life, and that *A. was seised thereof in tail, remainder to B. in tail*, that *A. suffered a recovery with voucher in the court of the manor*, and afterwards died without issue, and it was found, that there was *no custom to suffer recoveries in the court of the said manor*; all the Court held, that this recovery shall not bind the issue in tail, but upon a recompence in value, and here he can have no recompence of other lands in value; for he cannot have land at common law, nor can he have customary land; for if it should be so conveyed, then the lord would lose his fines, and the party to whose use the recovery was, should hold his land as a copyholder without grant or admittance by the lord, which is contrary to the nature of a copyhold. Cro. E. 391. pl. 14. Pasch. 37 Eliz. B. R. Clun v. Pease.

Same points were found by verdict, and that a recovery in a writ of entry on the post was suffered with voucher over; the court at first conceived it would be hard to warrant such recoveries without a special cus-

tom; quære. But afterwards it was adjudged that a *recovery with voucher* over against the tenant in tail himself, is at least a *discontinuance* as it is against tenant in tail in possession at common law; but whether it be a bar to the entail they agreed not in opinion; but for the cause of discontinuance judgment was given for the defendant. Cro. E. 380. pl. 38. Hill. 57 Eliz. C. B. Eylet v. Lane and Pearce.—*Recovery in value* shall be only of other copyhold [205] land *W. in the manor*. Mo. 359. pl. 488. Trin. 36 Eliz. Dell v. Higden.—Supplement to Co. Comp. Cop. 79. f. 12. cites S. C. and says, note for a conclusion of this point, that at this day, by the customs of several manors, common recoveries are had and suffered in the courts of lords of manors for the docking and barring of estate tails of copyhold; and much inconveniency would ensue, both if copyholds at this day might not by custom be entailed, and likewise if by custom common recoveries had of estates tail with voucher over in the courts of lords of manors should not thereby be docked and barred,

11. A copyhold may be entailed by special custom, and barred by a common recovery, and a surrender may bar the issue in tail by a special custom; agreed. Mo. 637, 638. pl. 877. Hill, 37 Eliz. Church v. Wyat.

Gilb. Treat. of Ten. 164. cites S. C. & S. P.

12. Recovery may be in the lord's court of a copyhold which shall bar an entail; agreed. Mo. 753. pl. 1037. Hill. 7 Jac. Oldcot v. Levell.

Gilb. Treat. of Ten. 164. cites S. C. & S. P.

agreed; and observes, that it is said generally, and is not put upon any custom.

13. An old dormant entail is presumed to be cut off after purchases and many admittances in fee. Clayt. 26. pl. 45. Arg. 10 Car. Wadsworth's Case.

14 The manner of barring entails of copyholds within the Manor of Wakefield in Yorkshire, is, for the copyholder to lease his lands for more years than he ought, or to refuse doing his services, and then the lord seises the lands for the forfeiture, and grants them over to another by the consent of him who made the forfeiture; but Roll Ch. J. said, that he conceived there could be no custom for this, because the seisure for a forfeiture destroys the copyhold estate; for it is at the lord's election, after the seisure, whether he will grant the estate again

Gilb. Treat. of Ten. 164. cites S. C. and says it is held to be good bar of a copyhold estate for the tenant in tail to commit a forfeiture.

ture, and the lord to seise and grant to another; or

if the tenant in tail surrenders to the use of the purchaser and his heirs, and the purchaser commits a forfeiture, and the lord seises and regrants, this is held to be a good custom to bar the estate tail of a copyhold, though the tenant in tail be not privy to it; by this it seems plain, that if tenant in tail commit a forfeiture, his issue is bound by it, but the lord cannot grant to no body else but to him that he intended to have the estate. Thus it seems plain to me, that *as estates by the custom may be entailed, so by the custom also these estates tail may be cut off by surrender, recovery or forfeiture, according to the several customs of manors.*— Custom of the manor was, to cut off entails by committing a forfeiture, and then appointing to whose use the forfeiture should be. A copyholder makes such forfeiture, and appointment, and dies before admittance of cesty que use. The heir of the copyholder was admitted, and then the lord of the manor sold the manor to J. S. who admitted the cesty que use, and his admittance held good, and that his admittance shall avoid all mesne acts or dispositions made by the lord as if admitted on a surrender. 2 Saund. 422. pl. 70. Pasch. 24 Car. 2. Grantham v. Copley.—Gilb. Treat. of Ten. 164. 165. cites S. C.

15. A copyholder in tail accepts a feoffment; this destroys not the custom as to his issue in tail, for he has no power to conclude him; yet if he commit a forfeiture, and the lord seises, it seems his issue is bound, it being a common and customary way to cut off the entail of copyhold lands. Gilb. Treat. of Ten. 282, 283. cites Cart. 6. 7. Mich. 16 Car. 2, C. B. Taylor v. Shaw,

[206] 16. Upon a trial at bar in ejectment for lands held of the Manor of Wakefield, it was admitted, that *by the custom of that manor, copyhold lands might be entailed, and that the custom to bar such entails is for the tenant in tail to commit a forfeiture, and then the lord to make three proclamations, and seise the copyhold, and then to grant it to the copyholder, and his heirs, and another custom to bar such entails is, for the tenant in tail to make a surrender to the purchaser and his heirs, and then for the purchaser (intending to bar the entail and remainders) to commit a forfeiture, and the lord to seise, and three proclamations &c.* that hereby the issue in tail is barred, though the tenant in tail did not join; and this custom was found by the jury, and allowed per Cur. as a good custom. Sid. 314. pl. 32. Mich. 18 Car. 2. B. R. Pilkington v. Stanhope.

The diff-
mission af-
firmed in
Dom. Proc.
Parl. Cases
69.

17. Bill by a remainder-man in fee of a copyhold expectant on an estate tail, which was spent, to be relieved against an erroneous common recovery in the lord's court, praying that the lord may be decreed to suffer the plaintiff to bring a plaint in the lord's court, in nature of a writ of error, to reverse this recovery, or that this court would relieve on the merits. Defendant demurred. Allowed by Trevor, Master of the Rolls, and after per Jeffries C. though the errors assigned were such as would have been gross errors in a recovery of a freehold estate; but if there had been an error in any adversary proceedings in the lord's court, this court would order the lord's court to proceed and examine it, and told the counsel they might try the common law court if they would grant them a mandamus, but they should have no aid from this court. Vern. R. 367, 368. pl. 360. Hill. 1685, Ash v. Rogle and the Dean and Chapter of St. Paul's.

18. A. copyholder for life, remainder to his 1st, 2d &c. sons in tail, remainder to B. in fee. A. before a son born gets a conveyance of the fee of the copyhold, thinking it would merge his estate, and destroy the contingent remainder; but decreed that the contingent remainder is not destroyed, the freehold being in the lord. 2 Vern. 243. pl. 228. Mich. 1691. *Mildmay v. Hungerford*.

But if he takes a conveyance of the freehold in fee; Ld. Chan. seemed to make little doubt but that the copyhold

was merged. Vern. R. 458. pl. 434. Paich. 1687. *Parker v. Turner*. — And afterwards decreed accordingly, and that the purchaser should enjoy against the issue in tail. Vern. 393. S. C. — 2 Chan. Cases 74 *Barker v. Turner*. S. C. Lord Chancellor was of opinion for the purchaser and that the conveyance was good against the heir; for the copyhold being severed from the manor, there is no means to bar it; but by conveyance at common law; the entail is not within the statute of Westminster 2d. But Lord Chancellor took time to advise.

19. A. was tenant in tail of the trust of a copyhold, remainder to J. S. A. requested the trustees to surrender to him in tail, which they refusing, A. brought a bill to compel them, and they put in their answers. Then A. died, but pending the suit, he went to the lord's court and desired to be admitted to surrender, which was refused, because the legal estate was in the trustees. Upon which A. by will, devised the premises to his wife &c. subject to the payment of his debts. Lord Cowper decreed the estate to go according to the will, there having been no laches in the testator, and having devised the estate to the uses and purposes in his will, his lordship conceived that was sufficient to bar the entail of a trust. 2 Vern. 583. pl. 525. Hill. 1706. *Otway v. Hudson & al.*

20. A recovery with voucher doth not of common right bar the entail of a copyhold, but that as to the entailing them, custom is requisite, so without custom the entail cannot be cut off. The reasons are, that because without an intended recompence in value, no recovery shall bind, and the surrenderee comes in in the post, by the lord, and is not in in the per by the party, and so no warranty can be annexed to the copyholder's estate; besides, they have only an estate at will, to which no warranty can be annexed of common right, for no estate less than a freehold is capable, by common right, of having a warranty annexed to it; and accordingly it was adjudged in CLUN'S CASE, and all the Judges held, that the recovery did not bind without a custom. But there is a quære, whether judgment was given for the plaintiff upon the principal matter, or no? for it seems to have been a discontinuance, and that the defendant's entry could not be lawful. There are two other cases where this question came in dispute, but was not resolved. It was held, in the Case of CHURCH v. WIAT, that a recovery by custom may bar, which implies, that without it it cannot bar; but in the Case of OLDCOT v. LEVEL, Mo. 753. it was agreed, that a recovery may be in the court of the lord that will bar a copyhold, and there it is said generally, and is not put upon any custom. It is debated, whether, if there be a custom to bar the issue of a copyhold estate by surrender to one in fee, whether that be good.

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good. Mo. 188. pl. 336. *HILL v. MORSE*. Now my Lord Coke says by custom, by surrender the entail of a copyhold may be cut off. *Gild. Treat. of Ten.* 163, 164.

Where a copyhold is intailed it will not be defeated or barred by a bare surrender unless a particular custom be found to warrant it per *Harcourt C. Ch. Prec.* 426. But per *Cowper C.* a surrender

21. A. copyholder in fee *by marriage articles covenants to surrender to trustees to the use of himself for life, remainder to the heirs male of his body, remainder to the heirs of his body.* A. dies before any surrender, and leaves B. his son, and M. his daughter. B. surrendered to J. S. and others his creditors, according to an agreement, for payment of his debts. There was no custom to bar entails by recoveries. B. dies without issue. Lord Harcourt decreed the copyhold to the daughter; but upon a re-hearing Cowper C. decreed for the surrenderees, because of the want of a custom to suffer recoveries, and so held the surrender would bar the entail in case the copyhold had been well settled. 2 *Vern.* 702. pl. 625. *Mich.* 1715. *White v. Thornburgh.*

by such tenant in tail will bind his issue unless a particular custom be found that a common recovery is necessary. *Ch. Prec.* 429. *Mich.* 1715. *White v. Thornborough.* *Gilb. Equ. Rep.* 107. S. C. in totidem verbis.

(G. c. 2) Entails. Pleadings &c.

Gilb. Treat. of Ten. 158. S. P. accordingly, or it must be shewn, that the issue have recovered after the alienation of his ancestor, or the like.

1. **TO** prove a custom to entail copyhold lands within a manor, it is not sufficient to shew copies of grants to persons and the heirs of their bodies, but they ought to shew that surrenders made by such persons have been enjoyed by reason of such matter; arg. But per *Wray Ch. J.* that is not so; for customary lands may be granted in tail, though no surrenders have been made within time of memory. *Le.* 175. pl. 244. *Hill.* 31 *Eliz.* B. R.

2. If a copyholder surrenders in tail, and the heir of the donee is to bring a *formedon*, he must count of the gift made by the copyholder that surrendered, and not by the lord, for he is but the instrument to convey it, and nothing passes from him. *Cro. E.* 361. pl. 22. *M.* 36 & 37 *Eliz.* C. B. *Poulter v. Cornhill.*

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(G. c. 3) Fines levied of Copyholds.

1. **ONE** recovered copyhold lands in the court of the manor by plaint in nature of a writ of right. It was moved in C. B. whether a precept might be awarded out of that court, to execute the recovery, and to put the recoveror in possession with the *posse manerii*, as in such cases at common law, with the *posse comitatus*. But resolved clearly, that it could not, for force in such cases is not justifiable, but by command out of the king's courts. 3 *Le.* 99. pl. 142. *Mich.* 26 *Eliz.* C. B. *Anon.*

2. A

2. A copyhold estate is not barred by a *fine and 5 years non-claim*. Noy 23. cites Trin. 2 Jac. Mills v. Bradley.

3. If there be a *lessee for life, remainder for life*, of a copyhold, and the *first tenant for life doth purchase the freehold of the copyhold, and levies a fine* thereof, and *five years pass*, this fine should bar him in the remainder of his copyhold. Supplement to Co. Comp. Cop. 80. f. 13. cites Mich. 9. Jac. in C. B. that it was adjudged accordingly.

4. A copyhold was granted to A. B. and C. for 3 lives successively, remainder to his eldest daughter for life &c. The lord by bargain and sale enrolled sold the inheritance to A. in fee, and levied a fine to him with proclamations. A. died, and D. his son and heir levied a fine &c. B. entered. Resolved that B. cannot enter after the bargain during the life of A. for B's. estate was to commence in possession after the death of A. and B's. estate is not divested by the bargain and sale, or fine, for the lord did what was lawful for him to do, and A. was in lawful possession, and was only passive and not active; and by acceptance he who is in lawful possession by force of a particular estate, cannot divest the estate of him who has the frank-tenement or inheritance. 9 Rep. 104. Pasch. 10 Jac. Margaret Podger's Case.

5. Copyholder in tail *levies a fine* of the land; the interest and estate is gone. Cart. 24. Pasch. 17 Car. 2. C. B. by Bridgman Ch. J. in delivering the resolution of the Court. Taylor v. Shaw.

6. In the case upon a special verdict in ejectment *a copyholder of a Dean and Chapter levied a fine with proclamations, and 5 years passed without any seizure or claim* by him that was Dean at the time of the fine levied, and *whether the succeeding Dean was barred, was the question*; and the Court, at the first opening, *held clearly that he was not*; for if so, the statutes of 1 & 13 Eliz. which restrain the alienation of the church-revenue, would be of small effect; cites 11 Co. Magdalen College's Case. Vent. 311. Trin. 29 Car. 2. B. R. in Case of Howlet v. Carpenter.

(H. e) Frank-Bank, and Tenancy by the Curtesy. In what Cases; And what it is; And how considered. [209]

1. [T seems, that *during the life of the tenant in frank-bank, who by her admittance is tenant to the lord*, and a copyholder, *the heir is not admittable*. See Le. 1. pl. 1. Hill. 25 Eliz. B. R. Borneford v. Packington.

Gilb. Treat. of Ten. 160. 161. cites S. C. and that it is there taken

for granted, that she shall hold of the lord, and that the heir shall not be admitted during her life, which, he says, plainly proves, that the course of tenure of copyhold land is not like that of freehold lands at common law; for in such case she should hold of the heir.

2. The

And. 194.
pl. 227.
Ewer v.
Aitwicks
S. C. and
agreed by
all, that
there cannot
be a tenant
in dower,
or by the
curtesy,
either of
fee-simple
or other
estate of

2. The custom of a manor was, that if any man had a wife seised in fee of copyhold lands, according to the custom of the manor, and had issue by her, that he should be tenant by the curtesy of the land; it was found, that *A. a copyholder was seised, and had issue a daughter, who was married to J. S. who had issue; A. died; his wife entered; the wife died before admittance.* The Court seemed of opinion, that the husband was well entitled to be tenant by the curtesy before admittance of the wife, and the delay of the admittance by the lord should not prejudice the husband, being a third person. Mo. 271, 272. pl. 425. Hill. 31 Eliz. Ever v. Aston.

copyhold, unless the custom allows it, and therefore *in action brought such custom must be shown in pleading.* — Gilb. Treat. of Ten. 271. cites S. C. and says, *quære*, whether a feme be seised to make her husband tenant by the curtesy before admittance, where the custom is for tenancy by curtesy? It seems reasonable it should make the husband tenant per curtesy, as well as the possession of the brother before admittance make the sister heir; and by the same reason the widow shall have her widow's estate, though her husband was not admitted. — If a copyhold descend unto a married woman, and her husband takes the profit thereof, and suffers a court day to pass without admittance of his wife, and then the wife dies, the husband shall not be tenant by the curtesy, but in the 12 Eliz. Dy. 291, 292. it seems that the contrary should be the better opinion. Calth. Reading, 69.

Supplement
to Co.
Comp. Cop.
81. f. 15.
cites S. C.
— Mo.
394. pl.
512. S. C.
adjudged
for the lord.
— 5 Rep.
116. a.
Oland's
Case S. C.
adjudged,
that in such
case the lord shall have the emblements, and that if she had leased the land, and the lessee had sowed it, the lessee should not have the emblements; for though his estate is determined by the act of a stranger, yet he shall not be (as to the first lessor) in better case than his lessor was. — Goldsb. 189. pl. 136. S. C. adjudged against the husband.

3. A woman copyholder *durante viduitate sua sowed the land, and before severance of the corn took husband.* It was adjudged the lord should have the corn, and not the husband, for although the estate of the wife was uncertain, and determined by the limitation, and not by the condition in fact, or in law, yet because it determines by the act of the feme herself, the lord have the corn; but otherwise it would be had she leased the land, and the lessee had sown it, in such case the lessee should have the corn; adjudged by Popham and Clench, contradicente Fenner, & absente Gawdy. Cro. E. (460.) bis. pl. 10. Pasch. 38 Eliz. B. R. Oland v. Burdwick.

4. Prohibition. It was held by all the Court, that if a copyholder makes a *lease for years* of land whereof a feme by custom is to have her widow's estate, *she shall not avoid* the lease, *unless there be an especial custom to avoid it*; for he comes under the custom, and by the lord's licence as well as the feme. Cro. J. 36, 37. pl. 12. Trin. 2 Jac. B. R. Fareley's Case.

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Lev. 21.
where an
estate for
years was
to com-
mence after
the deter-
mination of
an estate for life, per Twifden and Windham J. the lease for years does not commence till after the

5. The estate *durante viduitate* is but a branch of the husband's estate, and the admission of the husband suffices for the estate of the wife; and the estate of the husband was big with the estate of the wife, which was to be brought forth by the death of the husband; per Hobart. Noy 29. Hill. 15 Jac. C. B. Rennington v. Cole.

the lease for years does not commence till after the

the death of the wife. Hill. 12 & 13 Car. 2. B. R. *Chantrell v. Randall*.—2 Sid. 165. *Clarke v. Candle S. C.* Hill. 1659. B. R. adjournatur.—*Covenant* that an estate is *free from incumbrances, except an estate for life*, that was thereon; the estate was held of a manor, where by the custom the widow of tenant for life was to hold for widowhood. Tenant for life died, and left a widow; it is no breach of covenant; cited Arg. a Vern. 45. As the case of *Twiford v. Warcup*.—It is so far a branch of the husband's estate, that though the copyhold be of the custom of *Borough English*, and the husband dies, leaving 2 sons by one venter, and 2 sons by another, and all die, except the eldest son, in her life, upon the wife's death the eldest son shall inherit by reason of the old estate being continued by the fra. k-bank, and though the court were at first divided upon this point, yet judgment was after given for the plaintiff, and *Powell J.* said, that then the eldest son should take as heir to his father. *Holt's Rep.* 165, 166. Trin. 5 *Ann.* *Brown v. Dyer*.

6. Where a *mortgagee* of such estate, where the custom was for frank-bank, had *assigned to the heir*, the Court were of opinion, obiter, that the widow paying the mortgage money might be relieved in *equity*. Cumb. 234. Hill. 5 W. & M. in B. R. Benfon v. Scott.

7. In ejectment, a special verdict was found, viz. A custom that the tenants of the manor having a mind to alien, might surrender into the hands of two copyholders &c. that Scott being a copyholder in fee, did surrender &c. to the use of the plaintiff in fee, and died, leaving his wife, who claimed her free bank by the custom, and at the next court the surrender was presented, and thereupon the plaintiff admitted; and the question being, whether the surrenderee, or the wife for her free bank, should have these lands? It was adjudged for the plaintiff, for the wife's title does not commence till after the death of the husband, and then only to those lands of which he died seised, but the plaintiff's title began by the surrender; for the admittance relates to that, and that the case of two jointenants, 1 Inst. 59. b. rules this case. 1 Salk. 185. pl. 3. Pasch. 5 & 6 W. & M. B. R. Benson v. Scott.

—Carth. 275. S. C. adjudged. — So where the custom of a manor, and which was confirmed by act of parliament, was, that the wife should have 3 parts of the land of which the husband died seised in fee for her life, and for 12 years after, and the husband was seised in fee, but became bankrupt, and the commissioners sold their land, but before the admittance of the vendees he died, the wife shall not have the land, for her husband did not die seised. Jo. 451. pl. 4. Hill. 15 Car. B. R. Palmer v. Blake. — Cro. C. 568. pl. 6. Parker v. Blecke S. C. adjudged, for he did not die tenant because the bargain and sale took his estate from him, and ousted him of the copyhold. — S. C. cited a Vern. 194, 195. pl. 176. Mich. 1690. per Cur.

8. If a copyholder makes a lease by licence, this will defeat the wife of her free-bench; agreed. Freem. Rep. 516. pl. 692. Mich. 1699. Anon.

9. It was agreed, that if the husband forfeited, the wife lost her free-bench; for, as if he surrendered, it defeated his wife of her free-bench; so if he did any act which dermined his estate, it destroyed her free-bench. Freem. Rep. 516. pl. 692. Mich. 1699. B. R. Anon.

10. A copyholder *surrendered his estate to make a mortgage, and died before the mortgagee was admitted*, so that the estate remained in him at the time of his decease, and by the custom of the manor, the widow was entitled to her free-bench; and *after the death of the copyholder the mortgagee was admitted*; per Treby

Treby Ch. J. who said it was referred to him, and he advised with the Judges of the King's-Bench upon it, and determined it, that *this admittance related to the surrender*; *that although the husband died seised, yet the wife should not have her free-bench; and so it was said to be lately resolved in B. R. Freem. Rep. 516. pl. 692. Mich. 1699. B. R. Anon.

11. Frank-bank was to encourage the tenant to go into the wars, so that if he was killed the lord would not take benefit, but gave the estate to the wife to encourage him to fight; per Powell J. who thought this was the original of frank-bank. 11 Mod. 95. pl. 3. Mich. 5 Ann. B. R. Anon.

(H. e. 2) Frank-Bank. Widows, of what Persons shall have Frank-Bank.

Cited 4
Mod. 253.
in case of
Benfon v.
Scot. —

Gilb. Treat.

of Ten. 294. cites S. C. & S. P. for after sale of the lands by the commissioners by deed indented and inrolled, if the husband dies, he does not die seised.

Gilb. Treat.
of Ten. 305.
cites S. C.
says she
shall lose
it, though
there be no
special cus-

tom; for this amounts to an alienation.

1. **WIDOW** of a *bankrupt*, where the commissioners have made an assignment of the copyhold, shall not have her frank-bank, cited as the Case of Parker v. Bleke, 13 Eliz. 2 Vern. 195. in Case of Moyses v. Little.

2. Copyholder for life, where the custom was for frank-bank, was *attainted for felony*, and executed; per Winch J. who only was in court, it seemed the widow shall not have free-bank without a special custom. Winch. 27. Mich. 19 Jac. C. B. Allen v. Brach.

3. The custom was, that the feme of copyholder for life should have estate *durante viduitate*. The *copyholder took a lease for years*, by which the copyhold was determined. Adjudged that she shall not have estate *durante viduitate* after her baron's death. Jo. 462. pl. 3. Trin. 17 Car. B. R. Dugworth v. Radford.

4. The *widow of a cistui que trust* of a copyhold estate shall have her free-bench as well as if her husband had the legal estate. 2 Wms's. Rep. 644. cited per Sir Joseph Jekyl, Master of the Rolls, in the Case of Banks v. Sutton, as the Case of Otway v. Hudson decreed by the Lord Cowper 27th October, 1706.

(H. e. 3) Frank-Bank. How. And Pleadings.

S. C. cited
as adjudged
according-
ly. 4 Rep.
30. a. in
pl. 19.

1. **EJECTIONE Firmæ** was brought against a woman, who *justified, because the wife of a copyholder by the custom ought to have for life*. The custom was traversed. The defendant gave evidence of a widow's estate only. Held, that it will

will not maintain the issue, for this is of a less estate, and the word (tantum) makes it stronger against the feme. Dyer. 192. pl. 23. Mich. 3 Eliz. Linsey v. Dixey.

2. In trespass, the defendant justified, because Sir J. S. was seised of the Manor of D. within which manor the custom is, that if any man taketh to wife any customary tenant of the said manor, and hath issue, and shall overlive his wife, he shall be tenant by the curtesy; and pleaded farther, that *he took to wife one Ann, to whom, during the said coverture a customary tenement of the said manor did descend, and that he had issue by the said Ann, and that she is dead, and so &c.* And it was adjudged, that the husband, by this custom, upon this matter, should not be tenant by the curtesy; for Ann was not a customary tenant of the said manor at the time of the marriage. 2 Le. 109. pl. 140. Trin. 29 Eliz. in B. R. Savage's Case.

a Le. 208. pl. 207. cites S. C. as adjudged accordingly. This case was [212] denied. 1 Salk. 243. 244. Hill. 2 Ann. B. R. in pl. 4. per. Holt Ch. J. in delivering the opinion of the court, in the

case of Clement v. Scudamore. — But in Wms's Rep. 69. of the S. C. Holt only takes notice that this case was objected, and after repeating the substance of it says only as follows, (viz.) Now, admitting that case to be law, it does not affect ours &c. — But at the end of the report is a memorandum, that upon the first argument Holt and Powell justices *denied* Sir J. Savage's Case to be law. — S. C. cited according to a Le. because he is out of the custom Gilb. Treat. of Ten. 308.

3. A custom of a manor was found to be, that if a copyholder in fee died seised, his feme should hold it during her life, as frank-bank. The *lord infeoffs the copyholder, who died seised.* Whether she shall hold it was the question? and adjudged, that she should not; *but if the lord had infeoffed a stranger* of that land, yet the land remained copyhold, and the custom is not taken away. Cro. J. 126. pl. 14. Hill. 3 Jac. Lashmer v. Avery.

Supplement to Co. Comp. Cop. 73. f. 8. cites S. C.

4. A. copyholder for life purchases the fee, which is conveyed to trustees and their heirs, to the use of A. during the life of A. remainder to the wife of A. for life, remainder to A. in fee. A. conveys the remainder to his eldest son in fee; the copyhold estate for life still continues in A. and is not extinct or altered by the purchase of the fee which never was in him, but in the trustees only, till A. and the trustees conveyed the remainder in fee to the son, so that a *second wife* of A. shall be intitled to her customary estate. Hob. 181. pl. 218. Howard v. Bartlet.

a Roll Rep. 178. Walter v. Bartlet, Trin. 18 Jac. B. R. the S. C. adjudged accordingly. — Palm. 111. Trin. 17 Jac. B. R. Ward v. Bartlet, S. C.

adjudged una voce. — Cro. J. 573. pl. 1. Waldoe v. Bartlet, S. C. adjudged, Trin. 18 Jac. B. R. and upon a case made thereof in the court of wards, it was adjudged by the two Ch. Justices and Ch. Baron, that the copyhold remained &c. — Jenk. 318. pl. 15. S. C. by the two Ch. Justices, and Ch. Baron.

5. The husband, who was copyholder for life of a manor where the custom was, that the wife should have her widow's estate &c. *was attainted of felony.* The question was, whether, after he was executed, the widow should have her free-bench? and Justice Winch, who was alone in court, held that she should not, without a special custom for that purpose.

pose. Lex. Maner. 144, 145. cites Hill. 19 Jac. Allen v. Booth.

6. Where the *husband* is *attainted of treason*, the wife does not lose the dower of her copyhold lands. Hard. 434. Hill. 18 & 19 Car. 2. in Scacc. Duke of York & al. v. Sir John Marsham, Baronet.

7. A. was *admitted in trust for B.* to a copyhold, and the question was, whether the *widow of A. the trustee* did not come in paramount the trust, and should enjoy her widow's estate, and the court at law was divided upon it; cited 2 Vern. 46. pl. 41. Pasch. 1688. as the Case of Newbery v. Wighorn.

2 Vern. 585.
per Cowper
K. she shall
have it.
Otway v.
Hudson &
al. ———
Cited by the
Master of
the Rolls.

2 Wms's Rep. 644. Hill. 173a. in Case of Sutton v. Sutton.

8. Copyholder for life, where there is such custom, *agrees that J. S. should hold and enjoy during his life, and the widowhood* of such woman as he should leave at his death, and enters into bond for that purpose, and to surrender on request. A bill was brought by the purchaser against the widow, after the copyholder's death, to bind her by this agreement. The bill was dismissed with costs, for if such contracts for copyholds should be decreed, all lords would be defrauded of their fines &c. And put the case, if one *joint-tenant agrees to alien, and dies* before it is done, it would be a strange decree to compel the survivor to perform the agreement. 2 Vern. 45. pl. 41. and 63. pl. 56. Pasch. 1688. Musgrove v. Daffwood.

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(I. e) Guardian of Infants Copyholders. Who shall be.

1. IF a copyholder dies, his heir under the age of 14, the next of kin shall not have the custody of the copyhold land, for the *right of appointing a guardian* for them *de jure belongs to the lord*, that so he may be sure to have the services done him; this is a particular reason why the lord should have the custody of the lands against the common rule for the guardian in socage; but the reason not extending to the custody of the body, it seems the *guardian in socage shall have the body*. This guardianship, says Coke, *de communi jure* belonging to the lord, the *copyholder cannot by his last will and testament appoint another guardian*; quære, whether at this day, by force of the *Statute 12 Car. 2. cap. 24.* the devisee of a child shall have the guardianship of the child's copyhold lands; for the words of the act, see the Statute at large, Gilb. Treat. of Ten. 311, 312.

(K. e) Infranchisement. The Effects thereof, either as to the Land, or the Estates in it, or the Incidents to it.

1. **I**F the lord charges the inheritance of an estate, which is granted by copy for the lives of A. B. and C. and the custom of the manor is, that the first named shall first enjoy, and then the 2d, and then the 3d, and the lord by deed inrolled bargains and sells the inheritance to A. A. shall not hold this charged during his life; for the *mean estates in remainder* of B. and C. preserve A's. estate by copy from the incumbrances of the lord. 9. Rep. 104. 107. Pasch. 10 Jac. in Margaret Podger's Case.

If the lord grants a rent-charge out of the inheritance of copyhold land, and then grants the freehold and inheritance to the copyholder for

life, he shall hold the land discharged during his life. Gilb. Treat. of Ten. 235. cites S. C.

2. Debt against an heir upon a bond, and riens by descent in fee pleaded &c. and upon the evidence the case was, the land was copyhold, and by the ancestor an infranchisement of it was procured of the lord, and the freehold bought in &c. but *the copyhold was entailed long before, and by custom such entails had been* &c. within the Manor of Leeds, where &c. and whether this entail shall free the issue (for so the heir here was,) or that the copyhold shall be so extinguished by this purchase, that it be wholly swallowed up, and that no use can be made by the issue of this old entail was the question, and Thorpe Judge of Assise, thought *the issue might make use of the entail*. Clayt. Rep. 138. pl. 249. August 1649. Bernard v. Simpson.

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3. If infranchisement *only alters* the manner of the tenant's tenure, so as where the lord was bound to *repair a way ratione tenuræ*, the ancient freehold and copyhold tenants are not liable to contribute; for nothing is part of the manor but demesnes and services, and not the lands of the tenants, and though the copyholds are afterwards infranchised, yet they are *not chargeable*, because it only alters the manner of the tenure. Hardr. 131. Mich. 1658. in Scacc. Rich v. Barker.

4. A. copyholder *to him and the heirs male of his body purchased the fee-simple* to him and his heirs, and afterwards, for 300l. sold the land to the defendant, who was in possession several years; the copyholder died, leaving issue a son; a special verdict was found at common law; the question is, if the son has right now? The Lord Chancellor was of opinion for the *purchaser*, that the conveyance was good against the heir; for the copyhold being severed from the manor, there is no means to bar it but by conveyance at common law; the entail is not within the Statute of W. 2. but Lord Chancellor took time to advise. 2 Ch. Cases. 174. Hill. 1 Jac. 2. Barker v. Turner.

Jeffries C. afterwards decreed for the purchaser, and declared, he thought the purchaser of the freehold should attract the other estate which was but at will. Vern. R. 332. Parker v. Turner, cited 3 Wms's Rep.

S. C. ——— Ld. Ch. thought the copyhold was merged, 458. S. C. ——— S. C. cited 3 Wms's Rep. R 2

Rep. 10. in the notes, and says, quære if A. be a copyholder in tail, remainder to B. in fee, and A takes a grant of the freehold from the lord to him and his heirs, and dies without issue, is not B. in whom there was once a vested remainder in fee of the copyhold premises, intitled to the same? — And *ibid.* in the principal case, Trin. 1724. Dunn v. Green, Lord Chancellor held, that unless it be expressly found, that the custom of the manor allows of intails, then this is a fee conditional, and plainly merged by the grant of the freehold in fee; but supposing the custom of the manor does warrant intails, yet the copyhold is extinguished; because, in the eye of the law, that is but an estate at will, and must be merged by the grant of the freehold. The premises by such grant are severed from the manor, consequently the custom of the manor cannot corroborate the legal estate at will. The copyholder cannot hold of himself, and the copyhold, though intailed, is swallowed up in the greater estate of the freehold; and as the tenant, after such time as he took the grant, did not himself continue a copyholder, so his son, on the descent of the freehold, is likewise no copyholder, which may be said from son to son ad infinitum; moreover, if the intail of the copyhold be not extinguished, it will be a perpetuity, since the only proper way of barring the intail of a copyhold is by recovery in the lord's court, but after such severance, as in the present case, no recovery can be suffered in the lord's court.

a And. 168. 5. Copyholder purchased the freehold *with all the commons* belonging, yet the *common is extinct*; but if the word *Grant be in the deed*, if it is pleaded by way of grant it is good. Cumb. 127. Trin. 1 W. & M. in B. R. Speaker v. Styant.

Worledge v. King's-well.—But whether this was common in gross, or common appurtenant, it was not resolved. *Ibid.* 170.—Though the words (*cum pertinentiis*) will not pass the common, yet if the grant be, with all commons before used, it will pass. Bull. 2. Marham v. Hunter.—Though it be extinct at law, yet it subsists in equity. a Vern. 160. Styant v. Staker.

Freem. Rep. 273. pl. 300. 6. The lord leases a coal-mine for 99 years, and *grants a way* over copyhold lands in fee, which was not a way of right, or of necessity. The copyholder purchases the freehold and inheritance of it, by which the copyhold was extinct; whether by this the grant of the way in the lease of the coal-mine may *co-operate* as well as if the locus in quo had been in the hands of the lord at the time of making the lease? This was adjourned to be argued, but never was, the matter being compounded. 2 Lutw. 1248. Hill. 11 W. 3. Dixon v. James.

[215] 7. By infranchisement of his copyhold estate *common in the wastes* of the lord *out of the manor* is not *extinct*, but common in the wastes of the lord *within the manor* is thereby extinct. 1 Salk. 170. pl. 3. Hill. 4 Ann. B. R. Crowder v. Oldfield.

1 Salk. 366. S. C. — 6 Mod. 20. S. C. per Holt Ch. J. the common belongs not to the land, but to the copyhold estate.

(K. e. 2.) Infranchisement. Equity.

1. **HUSBAND** and wife, jointenants for life, remainder in fee to the wife. The husband purchases the freehold, and takes the conveyance *to himself and his wife, and their heirs*. The husband dies. The wife surrenders to the use of a daughter by a former husband; and decreed accordingly against the heir. 2 Vern. 164. cites Feb. 22. 1675. Croft v. Lyfter.

2. Copyholder in fee takes an infranchisement of his copyhold *in the name of a trustee*, and then *devised it* to a younger son,

son, who sells it to J. S. The heir at law recovered in ejectment, (as he might do upon his ancestor's admittance.) On bill by J. S. it was insisted, that the estate purchased of the lord was purely an estate in equity, according to SMITH AND MURRIN'S CASE, 4 Rep. 24. b. and that the disposition of the fee to the purchaser, was a disposition of the whole estate that the copyholder had, either in law or equity; and decreed accordingly; per Finch C. and affirmed on bill of review, per Jeffries C. Vern. 392. pl. 364. Hill. 1685. Dancer v. Evett.

3. Lord of a manor *infranchises a copyhold with all commons* thereto belonging. Decreed, that plaintiff enjoy the same right of *common* as belonged to the copyhold, and costs against the defendant. 2 Vern. 250. pl. 236, Hill. 1691, Styant v. Staker.

(L. e) Jointenants, and Tenants in Common.

1. **T**WO *jointenants in common* of a manor; a court is summoned by one without his companion; it is a void summons. D. 377. Marg. pl. 28. cites 27 Eliz. Henleston's Case.

2. If in that case the copyholder, who made the surrender, had died before the same had been presented, then the copyhold had survived to the surviving jointenant. Supplement to Co. Comp. Cop. 69. f. 3.

3. If a surrender be made of a copyhold to the use of a last will, and the surrenderor devises it to two, the one is admitted according to the purport of the will, this shall enure to both. Co. Comp. Cop. 50. f. 35.

Gilb. Treat. of Ten. 312, 313. S. P. For when he is admitted he is

in by the surrender, which he cannot be unless he be a jointenant; for that is his title by the surrender.

4. Two jointenants, copyholders in fee; one surrendered into the hands of the tenants, to the use of his will, and makes his will of the land, and dies; resolved, that this surrender should bind the survivor, for being prevented, it shall relate to the first time of the surrender, and judgment accordingly, Cro. J. 100. pl. 30. Mich. 3 Jac. B. R. Porter v. Porter.

Co. Litt. 59. b. S. P. accordingly, the surrender being presented at the next court,

the jointure was severed, and the devisee ought to be admitted to the moiety of the land, ——— Gilb. Treat. of Ten. 259. cites S. C.

5. One jointenant copyholder released to his companion; adjudged to be good without surrender and admittance; for per Hobart Ch. J. the first admittance is of them and every of them, and the ability to release was from the first conveyance and admittance. Winch. 3. Pasch. 19 Jac. Wase v. Pretty.

6. Two coparceners copyholders in possession, one surrendered his reversion in the moiety after his death. It was moved,

And cited it as adjudged 26

Elis. in
Platt's Case
and ibid.
cites 3 Car.
in Simpson's
Case. —
Supplement
to Co.
Comp. Cop.
69. f. 3. cites S. C.

that nothing passed, because he had nothing in reversion, and cited 5 Rep. Saffin's Case; 2dly, That it is not good after his death, and cites it as adjudged 2 Rep. Buckley v. Harvey; per Cur. the surrender is void, and it is all one in case of copyhold as of freehold. Godb. 451. pl. 518. Pasch. 10 Car. B. R. Barker v. Taylor.

7. A man *surrenders* copyhold land to 2, *equally to be divided*, they are jointenants; but such a *devise* would have made them tenants in common; per Twifden. J. Arg. Vent. 376. Trin. 26 Car. 2. B. R.

Cites 1.
Inst. 59. b.
Cro. J. 100.
Porter v.
Porter. —
Brownl.
127. S. P.
in case of
Allen v.
Nash. —
S. P. cited
per Coke.
Ch. J. was adjudged. Noy 142. in case of Allen v. Nash.

8. If there are 2 jointenants of a copyhold, and *one surrenders* out of court *to the use of his will*, and devises his moiety to a stranger, and dies, and afterwards this surrender is presented at the next court &c. the devisee ought to be admitted; for by the surrender and presentment the *jointure was severed*, for the land was bound by the surrender by way of *relation*. 4 Mod. 254. Hill. 5 W. & M. in B. R. in the Case of Benson v. Scott.

(L.e. 2) The King. In what Cases the King shall have Copyhold Lands.

1. **T**HE king shall not have the custody of an *idiot's* copyhold lands, for it is but estate at will by the common law, and his having the custody would be great prejudice to the lord of the manor. 4 Rep. 126. b. Pasch. 1. Jac. B. R. in Beverley's Case.

2. *Alien purchases copyhold* land; he cannot retain it, nor shall the king have it, but the lord of the manor. D. 302. Marg. pl. 46. says, that Harrison, in his Reading in Lincoln's-Inn, 1632. cited it as so resolved.

3. *H. purchased a copyhold in fee, in trust for an alien*, and upon an office found, *the king seized to have the profits answered to him*, the Court held, that they were not seiseable, neither was the trust forfeited to him, and an amoveas manum was granted, because the lord would lose his fine and services; besides, it may be prejudicial to a stranger, who may claim a title to this copyhold, and if it was not in the king's hands, might sue for it in the lord's court, but the king cannot be
[217] sued there, and the *king cannot be a tenant at will, and consequently not a copyholder*; per Hale Ch. B. Hardr. 435, 436. Hill. 18 & 19 Car. 2. in Scacc. cites 16 Car. The King v. Holland.

(M. e) Leases by the Custom, and without ; and who bound by them.

1. A Custom that a lord of customary land per custom may let this for life, and 40 years over, is good, but a custom that a lessee for life may lease per autre vie is not good. Mo. 8. pl. 27. Hill. 3 E 6. Anon.

2. If tenant in tail leases a copyhold by indenture, rendering the same rent as before, it is a good lease within the Statute 32 H. 8. per Cur. Cro. J. 76. pl. 6. cited as ruled 7 Eliz. in Sir Ja. Mervin's Case.

3. It was resolved by the Justices, that a custom, that a lessee for years may hold the land for half a year after his term ended, is no good custom ; but it was agreed, that the lord of a copyhold might by custom lease the same for life and 40 years after, and that such a custom was good. Co. Comp. Cop. 85. s. 19.

Mo. 8. pl. 27 Hill. 3 E. 6. Anon. S. P. as to the first part agreed by all the Justices and

the last point agreed by Montague and Hales, but that a custom that a lessee for life may lease for another's life is not good.

4. Copyholder for life surrendered to K. the lord of the manor in tail, the reversion in the crown. K. made a lease for three lives, the lease to begin from the day of the date, and the old rent was reserved, and more. It was resolved by the Justices, that it was a good lease within the Statute of 32 H. 8. if livery was made after the day of the date. Mo. 759. pl. 1050. Pasch. 3 Jac. C. B. Banks v. Brown.

Noy 110. S. C.

5. If a copyholder without licence of the lord makes a lease for years, the lessee that enters by colour thereof is a disseisor, and therefore cannot maintain an ejectment ; and the defendant cannot plead that the plaintiff by licence did not demise, for this is a negative pregnant. 2 Brownl. 40. Hill. 8 Jac. C. B. Petty v. Evans.

If a copyholder demises lands for three years without a custom or licence, he shall be

taken for a disseisor ; per opinionem Curie. Brownl. 133. Pasch. 8 Jac. Cramporn v. Freshwater. — 2 Keb. 598. Arg. says, that the lease of a copyholder is no disseisin, though it be a forfeiture, nor does it alter the estate of the lord. Hill. 21 & 22 Car. 2. B. R.

6. A. seised in fee surrendered to the use of B. and his heirs, into the hands of two tenants, according to the custom, to be presented at the next court, and no court was held in 30 years after, and before any was held, surrenderor and surrenderer, and both tenants, died. The heir of surrenderor entered, and made a lease for years of the copyhold according to the custom of the manor, and adjudged, that the lease was good. Godb. 268. pl. 372. Mich. 14 Jac. B. R. Anon.

7. Infant copyholder makes lease for years, this is no forfeiture ; nevertheless, as to a stranger, he continues lessee for years, though the lord may seise for a forfeiture, and though he was admitted by the lord, yet this does not avoid the lease, therefore his acceptance at full age is good, and shall bar the infant,

Lat. 199. S. C. — Godb. 364. S. C. — Noy. 98. S. C. — Lease for

years by
copyholder
is good
against all
but the
lord. Cro.
E. 535. pl.
68. Good-

infant, as if it was a lease of lands at common law; resolved and affirmed, because lease of a *copyhold for years, though it is a *forfeiture* in regard to the lord, yet shall be *good as to strangers*. Jo. 157. Pasch. 3 Car. B. R. Ashfield v. Ashfield.

wick v. Longhurst. ——— 676. Sparke's Case. ——— Cro. C. 304. per Gawdy and Fenner J. and that there is no difference where the manor is the king's, or a common person's; but Clench J. denied it, and Popham said nothing. Cro. E. 492. pl. 8. Hill. 38 Eliz. B. R. in case of Haddon v. Harrowsmith. ——— Gilb. Treat. of Ten. 276, 277. cites S. C. of Ashfield v. Ashfield, and says, that it seems the lord may enter for the forfeiture during the nonage, and need not stay to see whether the infant will accept the rent or no, for the particular prejudice done to the lord, and if he should stay his acceptance of services from the infant, in the mean time it would be a dispensation for the forfeiture; but then the infant, at his full age, by disagreeing to the lease, may avoid the forfeiture.

Gilb. Treat.
of Ten. 277.
cites S. C.
as adjudged
good.

8. A custom, that on payment of 10 years rent the lord should licence to let for 99 years, and that if he refused, the tenant might do it without licence, was adjudged good; cited by Moreton, as in the Case of Grove v. Bridges. 2 Keb. 344. in pl. 18. Pasch. 20 Car. 2. B. R.

(N. e.) Lease by Licence, and without. Good. And How it Operates.

Cro. E. 462.
pl. 8 S. C.
& S. P.
per Popham
and Fenner.
—— Pop-
ham 105,
106. S. C.
and agreed
that a li-
cense to
lease the

1. A Condition to a licence is void; as a licence to make a lease for years, on condition that he pay 20l. the 2d year; for the lord gives nothing by the licence, but only dispenses with the forfeiture, and the lessee is in by the copyholder and not by the lord, though *licence does not give a right, but only executes it as a livery or attornment*. Per Popham and Fenner Justices. Ow. 73. Hill, 38 Eliz. in Case of Haddon v. Arrowsmith,

copyhold cannot be made void by a condition subsequent to the execution thereof to undo what was once well executed; but a condition precedent may be united to it, because in such case it is no licence till the condition is performed. ——— If by the custom a copyholder may only make a lease for one year, and he is licensed to lease for ninety-nine years, it was doubted, whether he should *assign his licence or make an under-lease*; and held he might, because the lord's interest was bound for 99 years. 12 Mod. 230. in C. B.

Gilb. Treat.
of Ten. 280.
cites S. C.

2. A licence was granted to let the lands for 21 years to commence from Mich. last past; the copyholder made a lease for 21 years to commence from Christmas next following; adjudged, that this lease was not warranted by this licence. Cro. Eliz. 394. pl. 21. Pasch. 37 Eliz. C. B. Jackson v. Neale.

3. Tenant at will cannot by any custom make a lease for life by licence of the lord, and there cannot be any such custom for a lease for life as there is for years; per 3 Justices. Godb. 171. pl. 236. Pasch. 8 Jac. C. B. Anon.

4. If the lord grants licence to his copyholder to demise, and he demises it by indenture, it is the lease of the copyholder, and not of the lord. Hob. 177. pl. 203. Hill. 14 Jac. in Case of Swinnerton v. Miller,

5. If a copyholder makes a lease for 20 years with the licence of the lord, and after *dies without heirs*, yet the lease shall stand against the lord by reason of his licence, which amounts to a confirmation. Hutt. 102. per Cur. Mich. 4 Car. in Case of Turner v. Hodges.

Hutton J.—S. P. by Yelverton J. contra Hutton J. Poph. 188. Mich. 2 Car. B. R. Anon. — So if the copyholder should forfeit his estate, the lease perhaps would stand good against the lord, the demise being by licence; per Cur. Hob. 177. pl. 303. — S. P. Arg. Palm. 384. — Roll. Rep. 372. Arg. S. P. [*219]

6. The lord agreed with his copyhold tenant to grant a licence to let his estate for as long time, and in as large a manner as had been formerly granted to his father or mother, and 300l. was paid him for it. The agreement was proved, and defendant confessing he had granted a licence to the plaintiff's mother to let it for 60 years, decreed he should grant the like licence now. N. Ch. R. 49. 1650. Hungerford v. Austen.

7. If the copyholder make a lease for years by the lord's licence, the lessee may assign over his lease, or make an underlease for years, without any new licence; for the lord's interest is discharged for so many years. Gilb. Treat. of Ten. 282.

(N. e. 2.) Licence to let. Pleadings.

1. A Copyholder cannot make a lease for years unless by custom, or by licence of his lord, which ought specially to be shewn; per Cur. Cro. E. 728. pl. 5. Mich. 41 & 42 Eliz. C. B. Kensey v. Richardson.

2. In ejectment brought by lessee of a copyholder, it is sufficient that the declaration be general without any mention of the licence, and if the defendant plead Not Guilty, then the plaintiff ought to shew the licence in evidence; but if defendant plead specially, then the plaintiff ought to plead the licence certainly in his replication, and to shew what estate the lord had, and the time and place when it was made; for the licence is *traversable*. 2 Brownl. 40. Hill. 8 Jac. C. B. Petty v. Evans.

3. In ejectment by lessee of a copyholder it ought to appear what estate the lord had; for he cannot give licence to make a lease for longer time in the tenancy than he had in the seignior; and if the lord be only lessee for life of the manor, by the death of him the licence is determined, though the copyholder be of inheritance thereby. 2 Brownl. 40. Hill. 8 Jac. C. B. Petty v. Evans, als. Debbans.

(N. e. 3) Lord of a Manor's Power as to determining Disputes between Copyholders.

1. A Copyholder doth surrender to the use of one A. upon trust that he shall hold the said land until he hath levied certain monies, and that afterwards he shall surrender to the use of B. The monies are levied. A. is required to make surrender to the use of B. but A. refuses. B. exhibits a bill to the lord of the manor against the said A. who, upon hearing of the cause Supplement to Co. Comp. Cop. 80. f. 14. cites S. C. — Gilb. Treat. of Ten. 262.

cites S. C. according-ly:

cause, *decrees against A. that he shall surrender; but A. refuses; now the lord may seize, and admit B. to the copyhold, *for he in such cases is Chancellor in his own court, per tot. Cur. Le. 2. pl. 2. Hill. 25 Eliz. B. R. Anon.*

2. If a false judgment be given in a court *baron by the steward against a copyholder*, the copyholder, in such case, shall not have either a writ of error, or a writ of false judgment; but *he may sue in the court of the lord by bill*, to be relieved against such judgment, and the lord, as Chancellor, may give him relief therein, and shall restore the land to the party upon the false judgment given by the steward, and restitution made to the copyholder. Supplement to Co. Comp. Cop. 80. f. 14. cites 14 H. 4. 34.

Vern. 367. pl. 360. Hill. 1683. in chancery *Ash v. Rogle*, and the Dean and Chapter of St. Paul's, S. C. the defendant Rogle demurred; the Dean and Chapter answered the bill, and submitted to do as the court should direct. The demurrer was allowed by the Master of the Rolls, and afterwards argued again before Lord Chancellor, who was of the same opinion, and confirmed the Master of the Rolls's order; and both of them severally declared it would be of dangerous consequence, and contrary to equity, to give any relief in such case; and yet the errors assigned by the bill in the recovery were such as would have been gross errors in a recovery of a freehold estate; and lord chancellor said, if there had been an error in any adversary proceedings in the lord's court, this court would have ordered the lord to proceed and examine it; and told them, that they might try the common law courts, whether they will grant him a mandamus, but that he should have no aid from chancery.—a Chan. Rep. 287. S. C.

3. *Appeal from a decree of dismissal* made by the Lord Jeffrey's; the bill was, *to compel the Dean and Chapter, as lord of the manor, to receive a petition in nature of a writ of false judgment for reversing a common recovery* suffered in the manor court, in 1652, whereby a remainder in tail, under which the plaintiff claimed, was barred, suggesting several errors in the proceeding therein; and that the said lord might be commanded to examine the same, and do right thereupon. It was further urged, that there was no precedent to enforce lords of manors to do as this bill desired; that *the lords of the manors are the ultimate judges of the regularity or errors in such proceedings*; and that there is no equity in the prayer of this plaintiff, that if the lord had received such petition, and was about to proceed to the reversal of such recovery, equity ought then to interpose and quiet the possession under those recoveries; that Chancery ought rather to supply a defect in a common conveyance (if any shall happen) and decree the execution of what each party meant and intended by it, much rather than to assist the annulling of a solemn agreement executed according to usage, though not strictly conformable to the rules of law; for which reason it was prayed, that that appeal might be dismissed, and the dismissal below confirmed, and it was accordingly adjudged so. Show. Parl. Cases 67. 69. *Smith v. Dean and Chapter of Paul's (London)*, and *Rugle*.

(N. c. 4) Copyholder Lunatick, Idiot, &c.

1. IT was clearly agreed by the counsel of the *Court of Wards*, that a copyholder, who is an *idiot*, ought not to be ordered in this court for his copyhold, but it shall be done

done in the court of the lord of the manor. D. 302. b. 303. a. pl. 46. Trin. 13 Eliz. Anon.

2. A copyholder was deaf and dumb; the committee of the lord of the manor, who was in ward, granted the custody of that copyhold land to another, who entered, and the prochein amy of the copyholder entered upon the grantee; adjudged, that the lord shall have the custody; for otherwise he might be prejudiced in his rents and services, and his grant was good. Cro. J. 105. pl. 43. Mich. 3 Jac. Eavers v. Skinner.

Gilb. Treat. of Ten. 209. says, that the lord shall not have the custody of lunatick persons lands un-

less there be a custom for it; neither shall the king have it for the prejudice that would ensue to the lord.—Ibid. 290. says it was held by Hobart, that the lord of a manor hath not the custody of a lunatick's land de communi jure, but there must be a custom to warrant it.—Hob. 215. pl. 278. Hill. 15 Jac. S. P. by Hobart Ch. J. for the imitation of the king's power over freeholds makes no consequence; for though he took the statute to be only an affirmance of the common law, in case of the king, yet the collateral incidents of estates, as dower, tenancy by the curtesy, wardships &c. are not without special custom.—Gilb. Treat. of Ten. 290, 291. cites the principal case of Ewers v. Skinner, where no custom was laid, and the question was, between the prochein amy and the lord; and the reason given why the lord should have the custody is, because otherwise he would be prejudiced in his rents and services, which reason extends as well where there is no custom as where there is; and if the custody of one that is mutus & furdus of common right belongs to the lord, by the same reason of one that is lunatick; ideo quære.

3. Copyholder for life becomes lunatick, and A. his cousin sows his land; afterwards the lord grants the custody of the lunatick to B. A. takes the corn to the use of the lunatick, and B. brought an action of trover and conversion in his own name. It was said by the Court, that it was ill brought, for he ought to have brought it in the name of the lunatick. The second opinion of the Court was, that as this case stood, neither the lord nor the committee have any thing to do to meddle with the corn. Noy 27. Hill. 13 Jac. C. B. Cox v. Dawson.

Hutt. 16, 17 Pasch. 16 Jac. Anon. The opinion of the court was, that the committee was but as bailiff, and had no interest, but for the pro-

fit and benefit of the lunatick, and as his servant, and it is contrary to the nature of his authority to have an action in his own name; for the interest, and the estate, and all power of suits is remaining in the lunatick.

4. The lord of a manor has no power to dispose of the copyhold of a lunatick without special custom, no more than a man shall be tenant by the curtesy &c. of a copyhold without custom, nor the lord cannot commit during the minority of an infant copyholder without custom; agreed per tot. Cur. Hutt. 17. Pasch. 16 Jac. Anon.

5. Lord of a manor having a copyholder, a lunatick, in his custody, grants over the custody to another, who brings an action in his own name. It was held not to be well brought; for the committee has no interest, but only a bare custody, and therefore the action ought to be brought in the lunatick's name; and by the same reason, the lord himself could not bring an action in his own name; for if he had interest himself, he might have assigned it over. This being a bare custody, the grant by the lord could be no infranchisement of the lands. Gilb. Treat. of Ten. 290.

(O. c) Mortgages and other Charges. How they shall affect a Copyhold.

1. **I** F *tenant by the curtesy, or tenant for life, or for years, be of a manor, and a copyhold comes into his hands, either by forfeiture, or other determination, and then he becomes bound in a statute staple or merchant and afterwards demises this copyhold again, it shall be liable to the statute, because it was once annexed to the frank-tenement of the lord, and liable in his hands; but if a copyholder binds himself in a statute, his lands shall not be extended, because he has only an estate at will; and this diversity was said to be agreed in C. B. Mo. 94. pl. 233. Pasch. 12 Eliz. Anon.*

A surrender was decreed when the mortgage [222] was of the copyhold by deed, and no agreement to surrender. Fin. R. 331. Keen v. Sparrow.

2. *A. mortgaged freehold and copyhold lands to B. and A. agreed to surrender the copyhold, but died before it was done. Decreed, that the heir of A. when of age, shall make a sufficient surrender nisi causa within 6 months after his attaining 21. Fin. R. 272. Mich. 28 Car. 2. Pattison v. Tompison.*

There has been generally practiced in most copyhold manors, that upon the mortgage of a copyhold the mortgagor surrenders into the hands of 2 customary tenants, to the use of

3. *Copyholder of inheritance makes a mortgage surrender for 6 months, the money not paid, but mortgagee consenting to continue his money, and take a new surrender, the lord insisted on admittance of mortgagee, and to pay a fine for the two years value; the Court would make no decree in favour of the mortgagee, but only to try it at law, (if he thought fit) if the lord by the custom of the manor was bound to renew the surrender to accept the 2d, if not (though a hard case) yet was not to be relieved in equity. The matter was after ended by compromise, and a fine of 40l. paid to the lord, the estate being 100l. per annum. 2 Vern. 367. pl. 330. Mich. 1699. Tredway v. Fotherly.*

the mortgagee, upon condition to be void, if the money be paid at such a day; now to avoid the fine to the lord, the usual way is not to present the surrender at the next court, but after the court is over, to make a new surrender into the hands of two customary tenants, ut supra, and so from time to time, as often as any court shall be holden; which non-presentment is at law a forfeiture, and to be relieved against this forfeiture was a bill exhibited, which North Lord Keeper denied to help, but left them to the common law. Skin. 142. pl. 13. Mich. 32 Car. 2. in Chancery.

Chan. Prec. 237. pl. 199. Acton v. Acton S. C. A man before gives bond to the woman to leave her a 1000l. and then marries her, and dies intestate, and his estate both free and copyhold being all in mortgage, she takes out administration, and on a bill against the heir and mortgagee let into a redemption of the whole, though the bond was released and gone at law by the intermarriage, and though the copyhold not affected by the bond, it being in nature of a marriage agreement.

4. *Though a bond will not bind a copyhold estate, yet where there is freehold and copyhold in the same mortgage, decreed the plaintiff (who was a creditor by bond given her by her baron, before marriage to leave her 1000l.) to redeem and hold over. 2 Vern. 408. pl. 436. Hill. 1704. Acton v. Pearce, Saxby, & al.*

5. A. made a mortgage of all that mesuage called Bishops, with *all the land* therewith used, and enjoyed, or reputed part or parcel thereof, or *whereof any in trust for him were seised*. Bishops mesuage and lands were freehold. But A. had a right to 8 acres of copyhold, but the legal estate was in J. S. per Cowper C. here is *no specifick agreement* for the copyhold, and took it, that nothing was intended to pass but the freehold, and affirmed the decree made before. 2 Vern. 636. pl. 564. Hill. 1708. Oxwith v. Plummer.

6. *Bill by the heir of the mortgagor to redeem a mortgage of copyhold lands upon payment of principal and interest due upon the mortgage, the defendant insists to have a judgment which he had assigned to him, first satisfied before the plaintiff should be let in to redeem.* Curia, copyhold lands are not liable to an execution upon a judgment, and therefore the *judgment shall not be tacked to the mortgage* in this case, but the plaintiff shall redeem upon payment of what is due for principal and interest, and costs, upon the mortgage, without satisfying the judgment; per Harcourt C. MSS. Rep. Pasch. 13 Ann. Canc. Heir of Cannon v. Pack.

(P. e) Prescription by Copyholders. Good; [223]
and How.

1. COPYHOLDER shall *prescribe by usitatum est against his lord*, but against a *stranger* he shall prescribe *in the name of the lord*. Per tot. Cur. Mo. 461. pl. 646. Hill. 29 Eliz. Perry's Case.

2. A copyholder prescribes, that every copyholder of *such a parcel of wood had used* to cut down trees there growing, and held good; and a difference was taken between a prescription for *freehold and for copyhold land*; for *custom*, which concerns freehold, ought to be throughout the county, and cannot be in a particular place; but a prescription concerning copyhold land, is good in a *particular place*; for *de minimis non curat lex*, and that the law is not altered thereby, and it may be there is but one copyholder there for which he might prescribe; and custom to have *profit, apprender, privilege, or discharge*, may well be in a particular. Cro. E. 353. pl. 10. Mich. 36 & 37 Eliz. C. B. Taverner v. Lord Cromwell.

3. Copyholder lays a prescription in the Bp. of W. lord of the manor for himself and his tenants to be discharged of tythes, and then prescribes for the copyhold; though here is a *prescription upon a prescription*, one in the copyholder to make his estate good, and the other the lord to make his discharge good, yet adjudged by 3 justices, but Popham e contra, that prohibition lay for the copyholder. Yelv. 2. Pasch. 44 Eliz. B. R. Croucher v. Fryar.

that this prescription and its commencement at such time when all was in the lord's hands; and the one prescription is not contrariant to the other, though both were from time whereof &c.

4 Rep. 27.
a. b. pl. 15.
Trin. 26
Eliz. S. C.
but S. P.
does not
appear.—3
Le. 107.
pl. 158.
S. C. but
S. P. does
not appear.

Cro. E. 784.
pl. 23.
S. C. ad-
judged ac-
cordingly;
for all copy-
holds are
derived out
of the
manor, and
it shall be
intended
for

the one shall give place to the other.—Gilb. Treat. of Ten. 292. cites S. C.—Mo. 618. S. C. the court were at first divided in opinion, but afterwards it was adjudged by three justices, contra Popham, for the plaintiff in the prohibition, viz. that the prescriptions may stand together.

4. A *custom* which goes in maintenance and making of a copyhold estate shall be taken *favourable*; per Popham. Cro. E. 879. pl. 10. Pasch. 44 Eliz. in Case of Baspool v. Long.

5. If tenants of a manor will prescribe *to hold without paying any rents or services* for their copyholds, this is no good custom, *but to prescribe to hold by fealty for all manner of services*, is good and reasonable. Calth. Reading. 29.

6. If the lord will prescribe *never to hold a court but when it pleases himself*, this is not good; *but to prescribe never to hold a court for the special good of any one tenant, except the same tenant will pay him a fine for the same*, is good and allowable. Calth. Reading. 29.

7. If the lord will prescribe *to have* of his copyholders *in the time of peace, 2d. an acre of rent, and in the time of war 4d. an acre of rent*, this is good prescription, because there is a good consideration of the cause of this uncertainty; *but to pay unto the lord 2d. an acre rent when he will, and 4d. an acre rent when he will*, this is no good prescription, because there is neither good reason nor consideration hereof, nor can it ever be reduced into any certainty. Calth. Reading. 32.

8. If the lord will prescribe *to have of every of his copyholders for every court that shall be kept upon the manor, a certain sum of money*, this is no prescription according to common right; because he ought for justice-sake to do it gratis. Calth. Reading.

[224] 9. If the lord will prescribe *to have a certain fee of his tenants for any extraordinary court purchased, only for the benefit of one tenant*, as for one tenant to take his copyhold, or such like, this is a good prescription, according to the common right. Calth. Reading, 34.

10. If the lord will *have of any of his tenants that shall commit a pound-breach, 100s. for a fine*, this is good prescription, *but to challenge of every stranger that shall commit a pound-breach 100s. this is no good prescription*. Calth. Reading, 34.

11. If the lord will prescribe, *that every of his copyholders, within his manor, that shall marry his daughter without licence, shall pay a fine to the lord*, this is no good prescription according to common right. Calth. Reading, 34.

12. If the lord will prescribe *to have a fine at the marriage of his copyhold tenants, in which the custom doth not admit the husband to be tenant by curtesy, nor the wife to be tenant in dower, or have her widow's estate*, the prescription of such fine is not good; *but in such manor where the custom doth admit such particular estates, there a prescription for a fine at the marriage of his copyholders, is upon good consideration*. Calth. Reading. 36.

13. If

13. If a copyholder makes his title to his land by prescription, he must plead that the same land is, and has been, time out of mind, demised, and demisable; by the copy of court rolls, according to the custom of the manor whereof it is holden. Calth. Reading, 43.

14. A copyholder shall prescribe against a stranger, that the lord of a manor, for him and his tenants at will, have used the like &c. Calth. Reading, 45.

15. Copyholder for life cannot prescribe against his lord, but copyholder in fee may prescribe against the lord, for he has the copyhold in nature of land of inheritance. Sty. 233. Mich. 1650, B. R. Cage v. Dod.

(P. e. 2) Remainders limited. How. Good. And where they are Contingent.

1. **A** Copyhold, where the custom was to demise for three lives, is demised to one for life, remainder to such a wife as he should marry, and to the first son of their bodies. The first estate for life is good, but the 2 remainders are void, by the opinion of all the justices. Mo. 677. pl. 922. Mich. 44 & 45 Eliz. Webster v. Allen. Gilb. Treat. of Ten. 257. cites S. C.

2. Where there is a limited estate of copyhold lands and a contingent remainder depending thereupon, and the particular limited estate, which must support this contingent remainder, is destroyed, the question was, whether the contingent estate is thereby likewise destroyed? It was argued, that it was, for that the law is the same in that point, in copyhold cases, as it is in other cases at the common law, they being directed by the rules of the common law, and cited it as so ruled 13 Jac. B. R. But it was answered, on the other side, that copyhold estates do not depend the one on the other, as estates at common do. Sty. 250. Hill. 1650. B. R. in Case of Bawfy v. Lowdall. Gilb. Treat. of Ten. 249. cites S. C. and says, it is made a doubt; but as to this point we ought to distinguish, for it seems some are, and some are not; as for example, if an estate be given

to a copyholder for life, the remainder to the right heirs of J. S. if the tenant for life die, living J. S. there it seems clear that the remainder is destroyed; for it cannot take effect, [225] as by the limitation it ought; but then, if tenant for life in that case had committed a forfeiture, or made a surrender, and then living tenant for life, J. S. had died, it seems to be very clear, that his right heir might take; for his estate in remainder was not to take effect after the determination of the interest of tenant for life, but after his death, and when that happened he was able to take.

(Q. e) Rent incroached.

1. **I**F the lord incroaches rent of his tenant, the tenant cannot avoid it in avowry, but in assise or cessavit, or ne injuste vexes he may; but if such tenant infeoff another, his feoffee shall never avoid it, for he shall take the land in the same plight as it was given to him; Arg. 5. Rep. 100. b. Trin. 40 Eliz. C. B. in Penruddock's Case, cites 33 E. 3. Avowry 255. 18 E. 2. Avowry 217. 4E. Avowry 201.

2. En-

Pl. C. 49. b.
S. P. and
tenant can-
not traverse
the tenure,
but the seisin only, and must relieve himself by a *ne injuste vexes*, or *contra formam seoffamenti*, in case of *Woodland v. Mantell*.

2. *Encroachment of a thing of another nature* than what is reserved gives no seisin to the lord of such thing. *Kelw. 73. Mich. 21 H. 7.*

See 4 Rep.
21. b.
Bevil's Case
contra, and
Statute 32
H. 8. 2.

3. By the rules of law, in case of *incroachment of rent*, if the tenant makes but *one payment* of more than was due, he shall never go back from it; per *Wright K. 2. Vern. 516. pl. 465. Mich. 1705. in Case of Steward v. Bridger.*

which is, that the avowry shall be for rent within 40 years last past.

(R. e) Trees. Interest of the Tenant in Trees standing, or cut, or Windfalls.

1. **A** Custom for a copyholder to have common of *estovers* in the woods of the lord, parcel of the manor, of which the copyhold was held, was adjudged to be good. 4 Rep. 32. a. pl. 25. Mich. 29 & 30 Eliz. in Case of *Foiston v. Crachrode*, cites it as adjudged. *Pasch. 10 Eliz.* as it was said in this Case. And cites 21 E. 3. 34. 1 Mar. Dy. 114. 5. [6.] E. 6. Dy. 70, 71. a. pl. 37. &c. *Wythers v. Iseham.*

Gilb. Treat.
of Ten. 222,
223. cites
S. C.

2. Copyholder by common law may cut off the *under-boughs*, which cannot cause any waste, but the amputation of the top-boughs will cause the putrefaction of the whole tree, wherefore it is waste as well as the *decapitation* thereof. *Cro. E. 961. pl. 21. Mich. 36 & 37 Eliz. C. B. Dawbridge v. Cox.*

Mo. 817.
pl. 1098.
Trin. 5 Jac.
C. B. the
S. C. ad-
judged.—
8 Rep. 63.
S. C.

3. Lord of a manor (*where copyholders are for life, and where the custom is that the tenants have used to lop trees for fuel and repairs*) grants a lease for years of the manor, reserving the trees; such copyholders as come in after under the lessee may lop the trees as before; for the copyholders are in by the custom, which is above the lord's estate. *Brownl. 231. Swain v. Becket.*

[226]
a Brownl.
30. S. P.

4. If the tenant has *used to have lopps* for fuel and repairs, and lord *cuts down all the trees*, so that the copyholder can have no lopping, he may have his action for case against the lord. *Brownl. 231. Swain v. Becket*, and says it was adjudged in *Gosnold's Case*.

5. A custom that the lord shall have *maeremium*, and the tenants shall have *ramillos*, gives all the arms and boughs to the tenants; if per *Hobart Ch. J.* so where the custom was for the lord to have the *maeremium*, and the tenants the *residuum*; the *residuum* means the boughs and branches. *Godb. 235. pl. 326. Mich. 11 Jac. C. B. Bp. of Chichester v. Strodwick.*

6. *Non-use* and negligence in not taking the boughs does not *extinguish*, or take away the custom, as hath been often resolved in

in the like case. Godb. 237. pl. 326. Mich. 11 Jac. C. B. Bp. of Chichester v. Stodwick.

7. The whole Court clear in this, that by the custom the copyholder is to employ the timber for his reparation, and though with the *top and bark* he cannot repair, yet these he is to have, and may sell them, towards the defraying his charges in his reparation. 3 Bulst. 282. Trin. 14 Jac. B. R. Sandford v. Stevens and Smith.

Gilb. Treat. of Ten. 224. cites S. C.

8. Neither copyhold of inheritance, where the custom is to cut timber for repairs, nor lessee, can employ *trees blown down by the wind*, unto any such use, because hereby his special property ceases; much less can lessee or copyholder for lives by any such custom take trees; per Windham J. Keb. 691. pl. 5. Pasch. 16 Car. 2. Ailner's Case.

9. Copyholders claimed, as by custom, the timber trees on the copyhold, *without controul of the lord*; the lord claimed them as lord of the manor, and that the tenants had only the decayed wood for fuel, and necessary timber for repairs, but that to be had only with licence. *Commission was directed to several persons, to set out sufficient timber and wood for all manner of botes and estovers*, according to the custom used within the manor, and the same to remain for the use of the tenants, and the lord, and his heirs, to take the rest. Fin. Rep. 199. Hill. 27 Car. 2. Ayray v. Bellingham.

10. The tenant has the same customary or possessory interest in the trees that he has in the land; and if the lord has a mind to cut trees, his business is to *compound with the tenant*. 3 Cro. 361. that tenant may *lop under-boughs*, and *cut for repair and bote*; and 3 Cro. 5. is not law, as appears by Heiden and Smith's Case. 13 Co. If *birds build nests* in the trees, the *eggs are the tenants*, which shews he has the possessory interest in the trees, though his estate be but for years, and whether the lord may cut trees, leaving sufficient estovers, is very gently trod on in Heiden and Smith's case, but no copyholder can commit *waste* without a special custom, but all copyholders have *estovers of common right*. If a man grant all his estovers, and cuts down the wood, or does any other act whereby the grantee loses the benefit of the grant, case will lie; per Holt Ch. J. 12 Mod. 379. Pasch. 12 W. 3. in Case of Ashmond v. Ranger.

11. A copyholder has *only a possessory property* in timber-trees, which, if severed from the freehold by tempest, or otherwise, the property would be in the lord, per Holt Ch. J. And he said further, and so was the opinion of the Court, that it would be a hard custom for the tenant to claim such trees, for such custom would be to give away the property of the lord, especially in this case, which was occasioned by the act of God; he also questioned, if there could be such a custom, as for a copyholder to cut timber, he having only a possessory interest, by reason of its being annexed to the

Ibid. 94. pl. 8. Mich. 5 Ann. B. R. Anon. S. P. and seems to be S. C.—By a MS. case which I have of Mich. 5 Ann. B. R. [227]

v. Harrison copyhold lands. 11 Mod. 68. pl. 1. Hill. 1705. 4 Ann. B.R.
S. P. it Anon.
seems to be
S. C. and
to concern Mr. Bankes's manor of Kingston Lacy, where a custom was pretended, that wind-
falls belonged to the copyholder for life.

(R. c. 2) Trees. Lord or Tenant's Power as to cutting them down.

* He is only tenant at will and claims by custom and not capable of a grant. Arg. See Vent. 389. in case of Potter v. North.
1. IF the lord grants to the copyholder the trees growing, and which shall grow hereafter; and that it shall be lawful to the tenant to cut and carry them away, he may justify cutting the trees growing, and it is no forfeiture of his copyhold; for he has dispensed with the forfeiture by his grant; but he cannot cut the trees that grow after; for the grant is * void as to them; per Plowden and Popham, as Hedworth said, who was of counsel in it. Mo. 94. pl. 234. Pasch. 12 Eliz. Anon.

This case was denied for law, per Holt Ch. J. in Salk 638. in case of Ashmead v. Rager. — He may take them of common right as a thing incident to the grant, but the same may be restrained by custom, that is to say, that the copyholder shall not take them, unless by assignment of the lord or his bailiff &c. 13 Rep. 68. Heydon v. Smith.

Bulst. 158. S. C. cited by Williams J. as adjudged that such tenant cannot prescribe to cut down timber trees, but by way of usage he may for reparations; and in the principal case there, which was Trin. 9 Jac. NORTHUMBERLAND (EARL) v. WHEELER, the clear opinion of the Court was, that a prescription for a copyholder for life to cut down timber trees is against reason, and void in law.
3. In trespass vi & armis. The defendant in bar to the new assignment pleaded, that he is a copyholder for life of the Manor of M. in the county of S. and that in that manor there was a custom, that every copyholder for life had used, at his pleasure, to cut down all the elms growing upon his customary lands, and to convert them to his own use, when, and as often as he would, and so justifies; and a demurrer upon the bar; and the question was, whether the custom was good and reasonable? And the latter, [better] opinion was, that it was a good and reasonable custom, but now it is otherwise held. Brownl. 236. Pasch. 40 Eliz. Luttrell v. Wood & al.

Ero. J. 29. pl. 8. S. C. adjudged. — Bulst. 158. Williams J. says it was adjudged, in the case of Luttrell v. Wood, that copyholder for life cannot prescribe to cut down timber trees. — But by way of usage he may for reparations, per Williams J. Ibid. — If there is a copyholder for life, who by custom
4. A bare copyholder for life cannot prescribe to cut and sell the trees on his copyhold, but a copyholder of inheritance may, or a copyholder for life, where the custom is that he may nominate his successor, paying a reasonable fine to be assessed by the lord, or else assessed by the homage. Noy 2. cites Trin. 2 Jac. so held according to Yelminster Custom in Case of Powell v. Peacock.

Wood, that copyholder for life cannot prescribe to cut down timber trees. — But by way of usage he may for reparations, per Williams J. Ibid. — If there is a copyholder for life, who by custom

custom may name his successor for life, and so for that copyholder to name his successor, such a tenant for life cannot by custom cut timber; and if he had been a copyholder of inheritance, such custom is good. Gilb. Treat. of Ten. 223.

5. The lord shall not take all, but *must leave sufficient for* [228] *repairs*, per Coke Ch. J. Arg. 2 Brownl. 200. in *Cafe of Swain v. Becket*. And says Wray Ch. J. in 33 Eliz. was of the same opinion.

6. Where the *custom was, that a copyholder for life might name to the lord who shall be his successor*, this is such a privilege, that if the copyholder cuts down trees, it is no forfeiture, because he has a greater estate than a bare tenant for life. Brownl. 132. Hill. 6 Jac. *Rolls v. Mason*.

by the court, and judgment accordingly, per tot Cur. — S. C. cited Cro. C. 221. as agreed by all the justices; but they all agreed that such a custom for a copyholder for life to cut down and fell trees was not good, and they there cited the case of *Powell v. Peacock* to be so adjudged, and to be good law.

7. A copyholder alleges the *custom to be, that all the tenants within such a manor in Essex, had used to cut down trees to repair their copyhold and freehold tenements within the manor, and also to sell their trees at their pleasure*; and adjudged a good custom. 4 Le. 238. pl. 382. Pasch. 6 Jac. C. B. *Glascock's Cafe*.

tom; but the better opinion of the Court seemed to be, that the custom was

8. By the common law the lord of the manor may *take away trees cut down by copyholder* on his copyhold land without a special custom for it. Brownl. 42. Trin. 6 Jac. in a Nota.

9. *Custom for copyholder to cut trees at his pleasure is against the common law*, per Yelverton J. Win. 1. Pasch. 19 Jac. C. B. says it was adjudged when *Anderson* was Ch. J.

10. It is a good *custom, that a copyholder in fee may cut down trees, and sell them at his pleasure*, for here it is only to the prejudice of him and his heirs, and when he hath quasi an inheritance in the copyhold, he hath so also in the trees growing thereupon, but a copyholder for life hath but a particular estate in the land or in the trees. It is against the nature of a copyhold estate, that he should do acts in destruction of his estate, therefore customs that maintain them shall be all void, but not e converso, for all such are unreasonable and void, and the using of them will be a forfeiture. Cro. C. 220 pl. 7. Trin. 7 Car. B. R. *Rockey v. Huggens*.

by the copyholder of inheritance is good. — *Custom that every copyhold tenant may cut down at their will and pleasure is unreasonable and void*; for then a tenant at will might do it; so it is for a copyholder for life to do it; and one of the reasons given is, that succeeding copyholder would not have wherewithal to maintain the house and the plough, which plainly intimates that a copyholder may cut timber to make reparations, and the rather, because permissive waste is a forfeiture in him. Gilb. Treat. of Ten. 223.

11. Northey said, that the lord might cut trees on copyhold by *general custom* of copyhold, or else, if it were copyhold in fee, the wood could never be cut, which would be inconvenient; but Holt said, sure he cannot, for the copyholder has the same interest in the trees, that he has in the land, and he always hath taken it so. 12 Mod. 317. Mich. 11 W. 3. Earl of Kent v. Waters.

12. If there be a custom for a copyholder to take timber for reparation, fuel &c. such a custom is good, though the copyholder have but a particular estate, but he cannot do what he will with the timber. Gilb. Treat. of Ten. 223.

* Contra per Coke Ch. J. if the lord leave sufficient for reparations.

Godb. 174. pl. 239. Faich. 8 Jac. C. B. in case of Heydon v. Smith.

13. In case of copyholders of inheritance, it was adjudged lately in Dom. Proc. that neither the copyholder without the lord, nor *the lord without the copyholder, without a custom, could cut down the trees on the copyhold estate, and so reversed a judgment in B. R. Ex Relatione Servientis Chapple in 1727.

(R. e. 3) Trees. Remedy for Tenants, as to Trees cut by the Lord. And Pleadings.

Br. Trespas, pl. 73. cites S. C.

1. TRESPASS was brought by tenant at will, according to the custom of the manor of trees cut; the defendant pleaded, Not Guilty, and the jury found for the plaintiff, and he recovered his damages by judgment, though it be another's frank-tenement; quod nota. Br. Tenant per Copie, pl. 2. cites 2 H. 4. 12.

2. Copyholder brought trespass against the lord for cutting down and carrying away his trees &c. It was found, that the place where &c. was customary lands held of defendant, and that the trees were cherry trees, de magnitudine sufficiente essendi maeremium, and that the place where they grew was neither orchard nor garden; per Cur. the copyholder cannot cut down such trees which are not waste, but because it appears not by the verdict that the trees for which the action was brought, was timber in fact, but only de magnitudine essendi &c. the plaintiff had judgment. Le. 272. pl. 365. Mich. 25 & 26 Eliz. C. B. Anon.

Cro. E. 629. pl. 24. S. C. adjudged per Popham and Fenner, but Clench doubted, and Gawdy was absent.

3. Action on the case lies for copyholder against the lord for cutting pollards in his copyhold, ad damnum, declaring where by the custom, the copyholder used to have the shrowds and tops of all trees stowing and powling [pollingers] within the copyhold &c. It was agreed upon deliberation, and the plaintiff had judgment and writ of enquiry of damages. Mo. 546. pl. 727. Trin. 40 Eliz. Stebbing v. Gosnel.

—S. C. cited per Cur. 13 Rep. 69. —S. C. cited by Coke Ch. J. as adjudged upon demurrer. Roll. Rep. 196. in pl. 37. Faich. 13 Jac. B. R. —Brownl. 197. S. P. in case of Crogat v. Morris. —S. Brownl. 149. S. P. cited by Coke Ch. J. as adjudged in Whiteband's Case.

Cafe. — Noy 14. S. P. in case of Crofs v. Abbot. — Gilb. Treat. of Ten. 225. cites S. C. and fays this muft be understood where there is not fufficient besides.

4. A copyholder in fee prefcribed to have the *topping and loppings* of all trees for fire-bote and hedge-bote, and the lord having fold the trees, he brought trefpafs againft the vendee, and well, for hereby the lord deftroys the very thing in which the tenant prefcribes, and *ſuch a right may be good for a tenant for life*. Noy 14. Mich. 3 Jac. B. R. Crofs v. Abbot. Brownl. 231. S. P. in cafe of Swaine v. Becket.

5. *If the lord, where the tenant hath ſuch botes, cuts down all the woods and under-woods which are ſtanding and growing upon the lands, to prevent the copyholder of his botes,* he may have an action of *treſpafs againſt the lord*. It was reſolved in Heydon and Smith's Cafe. Paſch. 8 Jac. in C. B. Supplement to Co. Comp. Cop. 79. f. 13.

6. A copyholder ſhall have a general action of *treſpafs againſt the lord, quare clauſum fregit, & arborem ſuam &c.* ſuccidit. 13 Rep. 68. Paſch. 8 Jac. C. B. Heydon v. Smith. But this is for his entry, and for the cutting of the trees; for the ſpecial loſs which he hath, that is, for the loſs of the pawnsage, and of the ſhadow of the trees &c. 13 Rep. 70. S. C.

7. If the lord cut down ſo many trees *as not to leave ſufficient eſtovers &c.* the copyholders ſhall have treſpafs, *and the value* of the trees in damages, but if he *leaves ſufficient eſtovers*, then he ſhall have *treſpafs* too, but ſhall only recover *ſpecial damages*, viz. for the loſs of his umbrage, breaking his cloſe, treading his graſs &c. per Holt Ch. J. 12 Mod. 379. Paſch. 12 W. 3. In Cafe of Aſhmond v. Ranger. [230]

8. Treſpafs by *leſſee of a copyholder for life* againſt the ſervant of the lord of the manor for cutting down trees, held maintainable in B. R. and affirmed in Cam. Scacc. but reverſed in Dom. Proc. for the tenant could not cut the trees, and if be could not they muſt rot on the land; for then nobody could. 2 Salk. 638. pl. 6. Aſhmead v. Ranger. The leſſee was leſſee of a widow who had an eſtate by the cuſtom. 12 Mod. 378. Paſch. 12 W. 3.

Aſhmond v. Ranger. S. C. — 11 Mod. 18. S. C. thus viz. A. copyholder for life of a houſe and land, that by the cuſtom of the manor may ſell timber for repairs of the copyhold tenement, brings an action of treſpafs againſt the ſervant of the lord, who entered by his lord's command, and cut timber upon the lands of the copyholder, by which the copyholder had not ſufficient to repair the copyhold tenement; adjudged in B. R. by all the court, that the copyholder might have this action; which judgment was afterwards affirmed in the Exchequer Chamber by all the judges in England; and now reverſed in the Houſe of Lords, eleven againſt ten.

(R. e. 4) Forfeiture. What. And in what Caſes relieved.

1. **I**F a copyholder for life cuts down timber trees, it is a forfeiture of his copyhold; and ſo it was adjudged in BELFIELD AND ADAM'S CASE; but if copyholder makes a *leaſe for years*, and the *leſſee cuts down timber trees*, or commits other

waste upon the copyhold lands, the lord cannot enter upon the land for a forfeiture, but in such case the lord is put to this action upon the case against the wrong-doer. Supplement to Co. Comp. Cop. 76. f. 10. cites Winch. 62.

Gilb. Treat.
of Ten. 281.
cites
S. C.

2. If *unuer lessee for years of copyholder* cuts down timber, it shall not be a forfeiture of the copyholder's estate; per Cur. Str. 233, 234. Mich. 1650. on a Trial in B. R. Cage v. Dod

Gilb. Treat.
of Ten. 281.
282, cites
S. C. that
the grant
determines
the licence;
for the li-
cence is only a dispensation of the forfeiture, and gives no property; but the property being transferred to another before the felling, there must be a new licence to fell, because he is not party, nor privy to it; but if the lessee fell timber after such an alienation of the manor, it is no forfeiture; sed quære.

3. The lord grants the copyholder a licence to fell, and afterwards, before the trees are felled, the lord grants away the manor, though the licence be now determined and repealed, yet the cutting is no forfeiture; per Twifden J, Keb. 25. pl. 74. Pasch. 13 Car. 2. B. R. Munifas v. Baker.

Gilb. Treat.
of Ten. 281.
cites S. C.
and that the
lessor cannot take
advantage
of the for-
feiture; for
thereby the

4. Though a licence by lessee for years of a manor to a copyholder to fell timber be good against himself, yet it is void against the lessor, because the licence is derived out of the interest, and so can be of no greater extent than that, and the assignee of lessee may take advantage of it; per Twifden. Keb. 25, 26. pl. 74. Pasch. 13 Car. 2. B. R. Munifas v. Baker.

lessor would lose the services of his tenant; for he is the lord of whom the copyholder holds, and therefore he must take advantages of forfeitures, if any body can, which in this case he cannot do because of his licence; but then, when his interest is determined, since there is a prejudice done to the inheritance of the manor, it seems the lessor may take advantage of the forfeiture, for the licence determines by the expiration of the years.

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5. A forfeiture of a copyhold by felling of timber relieved in equity after a trial directed on an issue at law, whether the supposed waste was wilful or not, and found that it was not, Chan. Cases 95. Pasch. 19 Car. 2. Porter v. Bp. of Worcester & al.

(S. e) Trusts. What shall be said to be a Trust of Copyholds. And Cases concerning them.

1. A. Purchased a copyhold in the names of J. S. and J. N. in trust for A. A. being a villain, J. S. surrendered his moiety to the use of his own son. J. N. died seised. The son of J. S. and the heir of J. N. sold the copyhold to C. for 100l. C. had no notice of the trust, and the copyhold was worth 150l. It was decreed by Egerton Lord K. that A. should recover the 50l. only of J. S. (not the son of J. S. who was no party to the suit) and the heir of J. N. and that C. should hold in peace; but if notice had been proved in C. A. should have had the land, and no recompence for the over-value

value was given, because there was no fraud. Mo. 552. pl. 745. Pasch. 41 Eliz. in Chanc. Robes v. Bent and Cock.

2. A. took a copyhold estate in reversion for three lives, and the copy was to D. E. and J. S. successively, and the entry was D. *dat domino pro fine* 4l. By the custom of the manor the first taker may bar the remainder. D. and E. died. J. S. was admitted; the copyhold was decreed to the plaintiff, who was heir and executor to D. For per Finch. Ch. though A. paid the fine, yet when by consent D. was *made purchaser by the copy*, it shall be taken all one as if D. had paid it, and so all the estates in remainder shall be intended as in trust for D. and she may dispose of them, Ch. Cases 310. Hill. 30 & 31 Car. 2. Clark v. Danvers.

3. A copyholder surrendered to J. S. and his heirs, and declared by parol that his wife should have it if she survived him, and if both died it should be sold, and the money divided equally among the plaintiffs. He afterwards made a will, in which he took no notice of this copyhold, and he and his wife died soon after. The bill was to have execution of the trust, and the defendant was heir at law, and it was decreed, that where a surrender is made to a stranger and his heirs, he is but a trustee for the heir at law. N. Ch. R. 190. Mich. 1691. Chew v. Chew.

4. A copyhold is granted to three for their lives *successive*, but *no custom within the manor that the first taker may dispose* &c. of the estate. The two first lives died. The Court would not decree the remaining life to be a *trust for the first taker*, and to go to his executor or administrator, as had been done in other cases, where there had been such a custom, and the rather in the principal case, because the former copy was to J. S. the father of the first taker and to the first taker, and the surrender on which the present copy was taken, was by them both, *sub conditions that the lord make a new grant for three lives prout*, and it is *dant domino de fine* &c. so that the estate moved from the father rather than the now first taker; but it was agreed per Cur. that if it had been a *trust* it should go to the administrator, though it was an estate for lives and whether freehold or copyhold. 2 Vern. 264. pl. 249. Pasch. 1692. Ruddle v. Ruddle. [231]

5. Held by the Lords Commissioners, that if a copyholder purchases a copyhold for three lives, and puts in his own life and two others, *habend. successive secundum consuetudinem manerii*, if the first taker paid the money, the other two are but in the nature of trustees for him, and he may dispose of the estate in equity, although it be in a manor where there is *no custom for the first taker to dispose*, unless it shall appear that the other two lives were put upon some consideration, or in pursuance of some agreement &c. 2 Freem. Rep. 123. Pasch. 1692. Anon.

6. A. was tenant in tail of the trust of a copyholder with remainder over, and trustees refusing to surrender the legal estate

estate to him, he brought his bill to enforce them, and pending the suit, he offered at the lord's court to surrender, but was refused, because he had not the legal estate. *A. by will gave the estate to his wife.* Cowper K. decreed the estate to go according to the will, conceiving what A. had done, and endeavoured to do, was sufficient to *bar the entail of a trust*, and that where there is no particular method in the lord's court for barring entails, a general or common surrender is sufficient, even where the entail is of a legal estate. 2 Vern. 583. pl. 525. Hill. 1706. Otway v. Hudson Mills & al.

(T. e). Uses limited. How construed.

Cro. E.
386. S. C.
but adjournatur
Goldsb.
129. pl. 23.
S. C. but
not S. P.

1. **A.** Copyholder for years or life surrendered to the use of B. and his heirs for ever. The Bishop of W. who was the lord of the manor, consented to the surrender. The surrender is good, and the use void. Mo. 352. pl. 474. Hill. 26 Eliz. Portman v. Willis.

3 Salk. 206.
pl. 13. S. C.
& S. P.
held accordingly.
—12 Mod.
296. S. C.
with the
arguments
of the
court and judgment
accordingly. — Lord
Raym. Rep. 622. S. C.
with the arguments
of the judges at large,
and judgment given
that it was a *tenancy in
common*, contra to the
opinion of Holt Ch. J.
—Comyns's Rep. 88. S. C.
adjudged accordingly.

2. A copyhold estate was surrendered to the use of A. B. and C. and the heirs, equally to be divided between them and the heirs respectively. Turton and Gould Justices held this an estate in common, but Holt Ch. J. held it a jointenancy; but judgment was given according to the opinion of Turton and Gould. 1 Salk. 391. pl. 3. Hill. 12 W. 3. B. R. Fisher v. Wigg.

2 Lord
Raym.
1145. S. C.
& S. P. by
Gould. J.

3. A limitation of uses of a copyhold surrender must be construed by the same rule, and in the same manner as if it were a limitation in a deed, or any other conveyance at common law, and the *intent of a party* is not sufficient as in a will, for 32 H. 8. 1. leaves the testator at liberty to express his intent as he pleases, but the common law ties up conveyances to set-forms, and set-words; per tot. Cur. 2 Salk. 621. pl. 3. Pasch. 4 Ann. B. R. Idle v. Coke.

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(U. e) Pleadings.

1. **I**N trespass, the best opinion was, that it does not lie in custom for tenant at will to him and his heirs, according to the custom of a manor of a bishop, to say that the custom is, that if the bishop dies, that he shall be tenant to the king during his life, and after to his successor; for it does not lie properly in custom; and also, per Fulthorp J. the pleading is not good; for he who pleads custom, shall say, that the will is an ancient will, or borough, and then to proceed; for a new

new vill cannot have custom. Br. Customs, pl. 25. cites 21 H. 6. 36, 37.

2. The tenant for life by copy *shall say* in pleading, *that he is seised in his demesnes as of frank-tenement according to the custom of the manor &c.* Br. Pleadings, pl. 114. cites 21 E. 4. 80.

3. Every admittance, as well upon a descent as surrender, may be pleaded as a grant to avoid the inconvenience which would follow, if the copyholder should be forced in pleading to shew the first grant, for that was either before the time of memory, and so not pleadable, or within the time of memory, and then the custom fails. 4 Rep: 22, b. Mich, 23 & 24 Eliz. Brown's Case.

4. So he may allege the admittance of his ancestor as a grant, and shew the descent to him, and that he entered without shewing any admittance of himself. 4 Rep. 22, b.

5. But he cannot plead that his father was seised in fee at the will of the lord by copy of court roll, of such a manor, according to the custom of the manor, and that he died seised, and it descended to him; for in truth his interest, in judgment of law, is but a particular interest at will. 4 Rep. 22. h.

6. Lands are granted by copy, which were never so granted before, and the issue is, whether the lord granted by copy of court-roll *secundum consuetudinem manerii*? It was held per tot. Cur. that the jury must find that dominus non concessit, for though de facto dominus concessit per copiam &c. yet it was not *secundum consuetudinem manerii*; for the said land was not customary or demiseable; for the custom had not taken hold of it. Le. 55. pl. 70. Pasch. 29 Eliz. C. B. Kemp v. Carter.

Supplement
to Co.
Comp. Cop.
8a. f. 16.
§. C.

7. If one pleads a seisin of a copyholder in fee, and claims under him, he must shew of whose grant, as he ought to do of any other particular estate; but if he shew the admittance of the last heir, which is in nature of a grant, and may be pleaded as such, it is sufficient. Cro. J. 103. pl. 37. Mich. 3 Jac. B. R. Pistor v. Hemling.

8. The plaintiff shewed in his replication, *quod seistus fuit in dominico ut de feodo secundum consuetudinem manerii* de Ramefeden, of the house, and *de una virgata terræ nativæ*, and does not shew, that the same was customary land. The Court agreed they could not intend this to be copyhold land, but that he ought to have alleged expressly, that this was held by copy, or to have shewed some such matter. 3 Bulst. 230. Mich. 14 Jac. Elkin v. Wastell.

Roll. Rep.
411. pl. 54.
Wastell v.
Yelton,
S. C. but
S. P. does
not clearly
appear.

9. In trespass, the defendant justified because it was the freehold of J. S. and that he entered by his command. The plaintiff replied, that the land was customary land, whereof J. S. is seised in fee &c. and demiseable at will in fee, and that J. N. was seised in fee by copy at the will of the lord according to the custom &c. and died seised; and that it descended to two daughters, as heirs of J. N. and that at such a court dominus

dominus concessit eis extra manus suas &c. habend &c. to them and their heirs, whereby they were seised in fee, and demised to the plaintiff for years. The Court held, that the plaintiff had not made a good title, because *none can entitle himself to a copyhold without shewing a grant thereof*, and here he only shewing that such a one was seised in fee without shewing the grant thereof, it was not good. Cro. C. 190. pl. 19. Patch. 6 Car. B. R. Sheppard's Case.

10. In trespass for taking and impounding his cattle; the defendant pleaded, *that at the time of the supposed trespass &c. he was seised of several lands, parcel of the Manor of M. whereof the said cl. s. called L. is and was parcel &c. Ut de statu custumario hereditatio, descendible from ancestor to heir &c. according to the custom of the said manor, and so justifies damage feasant.* Upon a demurrer it was insisted for the defendant, that it did not appear by the plea that L. was parcel of the land of which the defendant was seised, but parcel of the manor; for the word (*whereof*) being a relative, refers *ad proximum antecedens*, which is the manor. And it is said, that he was seised *de statu hereditario descendible &c.* but does not shew of whose grant; for though it may not appear who was the first grantee. it being so long since the copyhold was granted, yet the admittance of an heir upon a surrender or descent amounts to a grant, and ought to be so pleaded. The Court were of opinion, that *where seisin in fee is pleaded of a copyhold estate by way of justifying an offence, with which the defendant is charged, he must set out the commencement of his estate*, and therefore the plea had judgment. 4 Mod. 346. Mich. 6 W. & M. in B. R. Robinson v. Smith.

Id. Raym.
Rep. 43.
Brittel v.
Bade, S. C.
held by 3
Justices,
but Powell
J. c contra.

11. In ejectment the defendant pleaded, that the lands were held of the Manor of D. which is ancient demesne. The plaintiff replied, and confessed, *that the lands were held of J. S. ut de manerio, de D. &c. which is ancient demesne, but that the lands are copyhold lands, parcel of the said manor.* The defendant rejoined *ex quo &c.* The plaintiff acknowledged the lands to be ancient demesne; it is not material whether they are copyhold or frank-free. Adjudged, that the replication was repugnant, because *land held ut de manerio must be frank free; for copyhold lands are parcel of the manor itself, and cannot be held ut de manerio*; therefore to say that they are held *ut de manerio*, and yet they are copyhold is repugnant, but the rejoinder is ill; for if they are copyhold lands, then an ejectment lies, because a writ of right will not, by reason of the baseness of the nature of copyholds. 1 Salk. 185. pl. 4. 7 W. 3. C. B. Brittle v. Dade.

1 Salk 364.
pl. 5. 1111.
4 Ann. B. R.
the S. C. in
error of the
judgment
in C. B. the
Court held

12. Case &c. for disturbing a copyholder in the enjoying his common appertaining to his messuage, in which the plaintiff set forth, *that he was seised of an house, and 10 acres of land in N. parcel of the Manor of W. by copy of court-roll in fee, according to the custom of the said manor (but did not say secundum consuetudinem manerii ad voluntatem domini), and that the plaintiff*

ut tenens customarius had right of common in Warmles, but was disturbed. Upon Not-Guilty pleaded, the plaintiff had a verdict, but the judgment was arrested in C. B. because those words were admitted, though the verdict had found the custom of the manor, and that the lands were parcel thereof. Nels. Abr. 525, 526. pl. 9. cites 1 Lutw. 126. Mich. 10 W. 3. Crowther v. Oldfeild.

that now after verdict this estate of the plaintiff must be taken to be a copyhold estate, and not a freehold

estate, because it is both laid and found, that the tenements were parcel of the manor, and that by custom the plaintiff ut tenens customar. has common, all which is utterly impossible, unless the tenement was copyhold, and therefore must be supposed, though the words (ad voluntatem domini) were omitted; and the judgment was reversed after great deliberation.

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13. In pleading a title to a copyhold estate, it is sufficient to shew a grant from the lord, but in case of a customary freehold, it is not enough to say that the lord granted it, or that A. surrendered to the lord, and he granted; but it must be shewn, that the surrenderer was seised in fee, and surrendered to the lord, and he granted. 1 Salk. 365. Hill. 4 Ann. B. R. Crowther v. Oldfeild.

a Lord Raym. Rep. 1231. S. P. in S. C. by Holt Ch. J.—3 Salk. 13, 14. S. C. but S. P. does not appear.

——— Lutw 125, 126. S. C. but S. P. does not appear.——— 6 Mod. 19. S. C. but S. P. does not clearly appear.

14. In case for inclosing his common; the plaintiff declared, that he was seised in fee by copy of court roll, according to the custom of the manor, but without saying ad voluntatem domini; though it be not good pleading, was yet held good after a verdict; for unless the lands were copyhold, it is impossible the finding could be true; per Holt Ch. J. 2 Lord Raym. Rep. 1231. Hill. 4 Ann. Crowther v. Oldfeild.

3 Salk 13. Hill. 4 Ann. B. R. S. C. says, this declaration was held ill after a verdict which had found it to be parcel

cel of the manor, as the plaintiff had set forth in his declaration, because the words ad voluntatem domini being left out, it does not appear to be copyhold; so taking it to be freehold, and not copyhold, then the prescription should be by a que estate at common law in his own name, and not in the name of the lord.——— 1 Salk. 364. pl. 5. Hill. 4 Ann. B. R. the S. C. held well after a verdict, because the lands were alleged to be parcel of the manor, and so reversed a judgment in C. B.——— 6 Mod. 19. S. C. the whole Court was clear to affirm the judgment, but at the importunity of counsel, they gave leave to speak to it again, et adjournatur.

15. In trespass, for breaking and entering his close, the defendant pleaded, that the Earl of Sussex was seised in fee of the Manor of G. of which one messuage and 40 acres of pasture lands were parcel and dimissa and dimissibilia in fee, by copy of court-roll ad voluntatem domini, according to the custom of the said manor, and descendible, and which do descend from ancestor to heir, in a course of succession, called tenant right &c. then he sets forth a grant of the premises to him and his heirs by copy of court-roll, and a custom for every copyholder of the manor to have common in the said pasture land, and so justifies the entering and chasing the plaintiff's cattle damage-feasant; and upon a special demurrer, the plaintiff shewed the cause, that this plea was repugnant and contradictory in itself, because the defendant had pleaded, that the premises were, time out of mind, dimissa & dimissibilia, by copy of court-roll, and yet, that they were descendible

descendible from ancestor to heir, which is repugnant and absurd, and for this reason the plaintiff had judgment. Nelf. Abr. 526. pl. 11. cites 2 Lutw. 1324, [Trin. 2 Jac.] Hutchinson v. Jackson.

¶ See (1. 2) (W. e) * Wills of Copyholds. Good. And what Words in Will extend to Copyholds, where Testator held Freehold and Copyhold.

1. A. Seised of a copyhold of the nature of Borough-English surrendered it to the use of his will, and by his will devised the land to his eldest son, *upon condition to pay 10l.* to his youngest son, and afterwards the youngest son *entered for non-payment*, and adjudged lawful; cited per Clench J. Goldsb. 154. Hill. 43 Eliz. as Wilcock's Case.

[236] 2. A. seised of a copyhold surrendered it to the use of his will, and *devised it to his eldest son, paying* his debts, and 100l. to his sister when of age, but if he failed to pay it, then she was to *have so much of the estate as would amount to the value*. She came of age, but the son refused to pay her, whereupon the homage allotted to her as much of the land as they adjudged the value of 100l. but the son, being admitted, *refused to surrender* the same. Decreed to pay the allotment or surrender according to the use declared in the will, N. Ch. R. 24, 8 Car. 1, Marston v. Marston.

Chan. Cases 39. Davie v. Beardsham, S. C. the Court held it clear that the copyholds so agreed for did pass by the will; for that the purchaser had an equity to recover the land, and the vendor stood trusted for the purchaser, and as he should appoint till a conveyance executed, but that the plaintiff came too late. — 3 Chan. Rep. 4. S. C. — S. C. cited 9 Mod. 75.

The copyhold will pass by the will (if a surrender was made) though the will takes no notice of its having been surrendered.

4. A. had freehold and copyhold land, and makes his will in these words, *I give all my estate of what kind soever, not before mentioned by me, to my wife, whom I make my executrix*; and it was held the copyhold land did pass, not by force of the words alone, but because it appeared that he *had made a surrender* of the copyhold estate before to the use of his will. 12 Mod. 594. cites Mich. 32 Car. 2. Rot. 473. in Case of Shaw v. Bull.

See Cary's Rep. Hill. 1 Jac. Manwood's Case.

5. W. B. Rector of D. in E. *by will in writing, attested by three witnesses, devised to his wife a copyhold estate en Ealing; afterwards the testator, on the day of his death, directed his nephew to obliterate some devises, but nothing as to the copyhold devised to his wife, and then caused a memorandum to be wrote that he had examined, perused and approved of the will as so obliterated and altered by his nephew in his presence, but did not republish it in the presence of three witnesses, but directed his nephew to carry it to Mr. Eldred, to have it wrote out fair, but before it was brought back, became delirious.* Held to be a good will, and the trustees decreed to surrender accordingly. 2 Vern. 498. pl. 449. 1705. Pasch. 1705. *Burkitt v. Burkitt.*

6. A. surrenders copyhold land to the use of his will, and then makes his will in writing, and devises his freehold and copyhold to *charitable uses*. The will was all written with his own hand, but had *no witnesses* to it. A. made a *codicil*, reciting the will, and this *4 witnesses* to it. It was urged, and not denied, that doubtless the copyhold was well devised, for that passed by the surrender, and not by the will; but Lord Cowper decreed the will was not good to pass the freehold, and not being good as a will, it could not operate as an appointment. Ch. Prec. 270. Mich. 1708. Attorney General for Sidney College v. Bains.

2 Vern. 597.
pl. 536.
Mich. 1707.
Attorney
General v.
Barnes S. C.
but S. P. as
to the copy-
hold does
not appear.
—A will
of a copy-
hold tenant
not attested
even by one
witness is

sufficient to declare the uses of a surrender made by him, and it falls within the reason of cases cited, that the party is in by the surrender, and not by the will, and the reason equally holds to give a good title under the surrender, though the will is not attested by any witnesses at all, but such will must be in writing, and then its being signed by the party is sufficient; and it is the same case of a trust of a copyhold, where the testator could not make a surrender of it, though it was objected that this differs from the former case, where a surrender is made of a copyhold estate to the use of a will, by reason that there the party is in by the surrender, whereas here the trust passes merely by the will, and that therefore the will ought to have had the three witnesses; but Lord Chancellor's opinion was, that this point must be so determined in case of trust, and if such attestation is not necessary where the copyhold is not in trust, it must consequently be the same where it is in trust; and in this case equity follows the law, and that this court is never more strict in requiring ceremonies to pass the trust of an estate, than it is to pass the legal interest in it. Barnard. Chan. Rep. 12, 13. Pasch. 1740. *Tuffnell v. Page.*

7. A. seized of freehold and copyhold devised *all his real estate for payment of his debts*, but had not surrendered the same to the use of his last will. Lord C. Parker was of opinion, that if the freehold estate was not sufficient to pay the debts, the copyhold should come in aid, and directed the master to see if the freehold was sufficient without the copyhold. Wms's Rep. 443. Trin. 1718. *Drake v. Robinson.*

8. But in case of such devise by the father, where he left *no debts, and the copyhold being Borough-English, descended to the youngest son*, and there being 3 sons, Lord C. Parker said, that though with regard to creditors the copyhold would be liable, yet as between the sons it would be a doubtful case. Wms's Rep. 444. Trin. 1718. *Drake v. Robinson.*

9. A *devise of all his estate whatsoever* comprehends all that a man has, real or personal, and when there is a surrender to the

the uses of his will, a copyhold estate will fall under the same construction. Comyns's Rep. 337. Pasch 6 Geo. 1. C. B. Scott v. Alberry.

* Arg. 9. 10. By a devise of * *all his lands*, copyholds, surrendered to the use of a will, will pass; and so it will by the words † *all his real and personal estate*; admitted. 9 Mod. 71. Mich. 10. Geo. in Case of Acherley v. Vernon.

—† A. contracted for purchase of lands, freehold and copyhold. It was adjudged, that by a devise of real estate, those copyholds would pass in equity; Arg. 9 Mod. 75. cites the Case of Woodyer v. Greenhill.

11. A surrender was made of a copyhold estate to trustees to the use of the will; a will was made with only 2 witnesses to it. It was admitted, that a will of a copyhold estate does not require three witnesses, but this is a devise of a trust relating to lands, so within the very words of the statute of frauds; the heir controverting the surrender and the will, this point was not determined; but two issues ordered, though the Chancellor seemed to be of opinion, that the devise of a trust must ensue the nature of the estate, and not make it to be necessary to have three witnesses, as the copyhold might be devised without three witnesses, this may be a question to be determined when the issues are tried. Sel. Cases in Lord King's Time, 42. Trin. 11 Geo. Appleyard v. Wood.

MS. Rep.
Hill Vac.
1733. An-
drews v.
Waller.

12. An appeal to Lord Chan. the case was, S. M. having issue 3 daughters, (viz.) Mary, Martha, and Samuela, and having freehold lands in A. J. and W. and some copyholds in J. (some of which he had surrendered to the use of his will) he made a will, and devised part to trustees for charities, and to each of his two daughters, Martha and Samuela, distinct part of his freehold lands, and money and legacies; to his wife the house he lived in, and several closes by name, till his daughter Mary should attain 21, and then are these words, *and after then the house and grounds, and all other my messuages, cottages, lands, tenements and hereditaments whatsoever, in A. J. and W. not herein before otherwise disposed of, with their, and every of their appurtenances, unto my said daughter Mary, and to the heirs of her body, to enter upon at her age of 21, and not sooner.*

[238] Mary marries plaintiff Andrews, and bill brought by them for an injunction, and to have the want of a surrender supplied.

Quære 1. Whether the words of the will were sufficient to pass the other copyhold in A. to the daughter Mary?

2. If equity should supply the want of a surrender in this case?

Heard at the Rolls 10 Feb. 1732. and held that the copyhold not devised to charities did pass by general words to plaintiff Mary, and that equity should supply the want of a surrender, and decreed accordingly, and a perpetual injunction.

Ejectment

Ejectment was tried before Justice Cowper, and a case made for the opinion of C. B. where it was held, that the words were sufficient to pass copyhold, and the Master of the Rolls of the same opinion; and as to the second point, the parent is the proper judge of the provision of his children, and here are no children provided for.

Upon appeal to Lord Chancellor it was objected, that the copyhold lands did not pass, and that equity ought not to aid a surrender to the prejudice of two other sisters, who with plaintiff were heirs at law, and plaintiff better provided for than the two other sisters, exclusive of copyhold, and here there were other freehold lands whereon the general words might operate.

Lord Chancellor said, the rule of evidence is the same here as at law, the proper evidence of surrenders, or title to a copyhold, is the court roll, or a copy of it, or it must appear they existed once, and are lost &c. and so make way to go into parol evidence.

Plaintiff has no title at law, and as to an equity title, if it does not appear to be a testator's intent to give this copyhold to Mary, the Court ought not to give it, but must expound and collect testator's intent from the words of the will. It is clear, that the general words (viz. of all other) will take in the rest of copyhold as well as freehold. As to cases where a surrender is not supplied, they stand upon this reason, that the intention could not be collected to give lands to uses to which testator could not give them, but *when the intention can be collected, though there are improper words, yet they pass in consideration of this Court*, where, if there had been a surrender, they would have passed in favour of creditors &c. and was of opinion, that the testator intended to comprise copyhold in the devise to his daughter Mary, and if he did so, the rule is general, that *such devise is good to a wife, younger children, or creditors*, but objected that Mary is not the youngest child, she is indeed eldest, but piece of a whole heir at law, and if sole heir, yet it is common in cases of portions, that the eldest is considered as the youngest if not provided for. *In case of Borough-English, the youngest must be considered as heir, so in Gavelkind*, in regard to what does not descend in common, they stand in place of younger children; to determine otherwise would be to determine upon words, and not according to the nature of things.

As to the provision made for Mary, he doth not know that the Court hath gone minutely into the consideration of that &c. otherwise where the heir is totally disinherited. In *Boss AND Boss* the heir had but 6l. a year, & de minimis not curat lex, and in effect a total disinheritance, but where there is a provision not unreasonable, and where the heir is not left in a despicable condition, the Court has not gone so far. In *Case of BURTON AND FLOID*, it was laid down by Lord Harcourt in the strongest terms, and there, after an estate tail a surrender

surrender was supplied; and here defendants claim another estate by the same will, and where a devisee claims a bounty, he must take the whole, or reject the whole, according to the will. Decree was affirmed.

[239] The quantum of a provision of a child is in the father's power and discretion; a man is bound by nature to provide for all his children, and in this case the father had provided for two, and intended to provide for the third; he intended to make a compleat provision, and give all that he had among his three daughters, and to leave nothing to descend:

(X. e) Equity. Of Bills in Chancery as to Copyholds.

1. **A** Suit was touching certain lands which the *plaintiff claimed by lease, and the defendant as copyhold*, and because the plaintiff failed in his proof, and the *defendant shewed his copy and ancient court-roll*, proving it to be ancient copyhold, the lands were decreed to the defendant according to the copy against the plaintiff, his executors and assigns, till the plaintiff should prove a better title. Toth. 122: cites Fotherington v. Edington.

2. The plaintiff's bill was, for that he being a copyholder leased to the defendant for years, and the *defendant hath digged gravel, and sold the same away*, whereby the copyholder is prejudiced; the defendant justified, for that the copyholders are not punishable in waste, which cause this Court alloweth not of; for though the copyholders of the manor are not punishable, yet the lessee of copyholders of the manor are punishable, therefore a Subpcena is awarded to shew cause, why an *injunction* shall not be granted for *staying his digging of gravel, and felling woods* upon the copyhold lands. Cary's Rep. 89, 90. cites 19 Eliz. Dalton v. Gill and Pindor.

3. A decree is made for the defendant to *enjoy certain lands*, as well copyhold as customary, Cary's Rep. 105. cites 21 & 22 Eliz. Bamborow v. Alexander.

4. A *composition formerly made* between lords and tenants ought to *bind a purchaser or an heir*; so decreed. Toth. 111. cites 40 Eliz. Sterling v. Tenants of Burton.

5. Where a *bill is brought for surrender of a copyhold estate held for lives, the lord must be made a party*, because when the surrender is made, the estate is in the lord, and he is under no obligation to new grant it; *contra in cases of copyholds of inheritance*, for there the lord need not be a party. Mich. Vac. 1720. in Canc.

6. Bill was brought for specifick performance of covenants. The *plaintiff sold the defendant a copyhold estate of the yearly value of 16l.* (on which was timber to the value of 150l.) for 630l. and covenanted to *surrender on or before Michaelmas then next*; the defendant paid 10s. in part of the purchase, entered on the premises,

premises, cut down timber, stocked the land, and did every thing as owner. The plaintiff proved he gave notice in writing, that he would surrender next court-day, and attended accordingly; on the defendant's part there were several proofs, that he was disordered in his senses, and though there be proof that the timber was of the value of 150*l.* yet as no custom is alledged of the tenants having power to cut it down, it must be according to the common law, by which the tenant has no power over it, and therefore a plain imposition. The Chancellor was of opinion, it was a great *over-value*, and that his cutting down of timber was a convincing proof of his folly, because a direct forfeiture; but as it is, it is a matter merely at law; [240] the covenant is to surrender at or before Michaelmas; you say you were ready at the next court, which does not appear to have been before Michaelmas; if surrender had been, action would have laid at law; bill dismissed. Sel. Cases in Chanc. in Lord King's Time. 3 Mich. 11 Geo. Edwards v. Heather.

7. If *vendee of a copyhold by articles of agreement* files a bill against the copyholder for *specifick performance*, and makes the lord a party to compel him to admit according to the agreement, the Court will decree the admittance; but there having been no tender of a surrender to the lord in this case, and consequently no refusal, the lord was ordered his costs. G. Equ. R. 188. Hill. 12 Geo. 1. in Canc. cites Sayle v. Reeves.

(Y. c) Disputes at Law and in Equity between Lord and Tenants.

1. IT is decreed, that the defendant and his heirs shall from time to time *yearly pay to the plaintiff and his heirs, lords of the Manor of Kenetworth, the rent of 3*s.* 4*d.** for the piece of ground called the Hawte, together with the *arrearages* thereof, since the 6 of E. 6. and shall henceforth do *suit and service* to the court of the plaintiff and his heirs, owners of the said manor, and the plaintiff and his heirs shall have and receive the *finés and amerciaments* of service done by the tenants of the said Hawte. Cary's Rep. 73. cites 6 Eliz. Fol. 145. Litton v. Cooper.

2. The Court compelled the lord to *admit* a tenant copyholder to *sue at law* without any forfeiture of his copyhold. Mich. 31 & 32 Eliz. Fo. 21. Toth. 65. Gravener v. Rake.

3. A suit was to *compel the lord to grant a licence to let a copyhold*, but because the defendant by his answer said that the copyhold was forfeited, the Court would not inforce him to grant a licence till the forfeiture was examined. Toth. 107, 108. cites 1592. Ballard v. Agard.

4. A copyholder can have no *assise of common* against his lord, but is to be relieved in equity. Toth. 108. cites 38 & 39 Eliz. Tenants of Petworth v. E. of Northumberland.

Ibid. cites same year Colcot v. Lea.

Gilb. Treat.
of Ten. 292,
293. S. P.

5. *Alteration of a custom by consent* of lord and tenants was allowed in Chancery, and decreed accordingly. Lex Custum. 323. cap. 35. cites 10 July. 44 Eliz. Dyer v. Dyer.

Gilb. Treat.
of Ten. 292.
says *querre*,
whether it
will reduce
a *fine* un-
certain into
a certainty

6. Lord of a manor was decreed to admit copyholders at a *fine certain, which he afterwards refused to do*; and thereupon copyholders were relieved, who were no parties to the decree. Hard. 169. Arg. cites the Case of the Earl of Derby v. Wainwright.

at the suit of all the copyholders; for though there be an equity in moderating an excessive fine, yet it seems there is none to reduce an uncertain fine to a certain one at the suit of the tenants.

2 Bulst. 336.
S. C. and
held per tot.
Cur. that
the action

[241]
does not lie
for refus-
ing to
admit; and
Coke Ch. J.

7. If a lord of a manor, where the custom is for a copyholder to nominate his successor, *refuses to admit a person named by a copyholder to be his successor*, he cannot bring an action on the case against the lord, and has no remedy to compel the lord to admit him but by order in Chancery, and the remedy against a lord of a manor for non-admittance is only in Chancery. Cro. J. 368. pl. 1. Pasch. 13 Jac. B. R. Ford v. Hoskins.

said the plaintiff might go into Chancery. — Roll. Rep. 125. pl. 7. S. C. adjournatur. — Ibid. 195. pl. 37. S. C. adjudged, per tot. Cur. against the plaintiff. — Mo. 842. pl. 1137. S. C. resolved that the action does not lie.

S. P. Toth.
65. March
v. Gage.

8. The Court compelled a lord to admit a tenant. Toth. 65. Mich. or Hill. 5 Car. Newby v. Chamberlain.

9. *Mortgagee of a copyhold estate* was relieved against the lord who had got possession, and a release from the mortgagor, and the court held, that though such release had extinguished the entry of mortgagor, yet the same should enure to the benefit of him that had the former right in trust only, and for the use of mortgagee; and decreed the possession to him accordingly against the defendants, and all claiming under them, and that the lord of the manor should account for the profits since his entry, deducting only his fine. N. Ch. R. 7. 5 Car. 1. Lucas v. Pennington & al.

10. An issue as to *finer of copyhold*, whether certain or arbitrary, having been tried at law, the Court would not relieve otherwise than for preservation of witnesses. 2 Chan. Rep. 76. 24 Car. 2. Smith v. Sallet.

11. Tenant for life of a *copyhold* with a contingent remainder to his first son in tail, having no son born, and thinking to vest the whole fee in himself, buys in the reversion in fee of the copyhold at 550l. but finding this would not by merger (the freehold being in the lord) destroy the contingent remainder, brought his bill to be relieved against the security he had given for the purchase money, being deceived as to the effect of his purchase; per Cur. pay principal, interest, and costs, or be dismissed with costs. 2 Vern. R. 243. Mich. 1691, Mildmay v. Hungerford.

12. A customary tenant opened a copper mine in his land, and dug and sold ore, and died, and the heir continued digging and

and disposing of great quantities out of the said mine. The lord of the manor brought a *bill against the executor* and heir *for an account* of the said ore, and alleging, that these customary tenants were as copyhold tenants, and that the freehold was in the lord. And Lord C. Cowper held that the executor was liable, and distinguished between this which was a taking away the lord's property, and other trespasses as die with the person, as that of ploughing up meadow, or ancient pasture, but sent it to law to try the right of the tenant, there being proof that the tenants used to sell timber, and dig stone, and sell it. But there never having been any copper-mine before discovered in the manor, the jury could not find that the customary tenant might by custom dig and open new copper-mines, so that, upon producing the *postea*, the Court held, *that neither the tenant without the consent of the lord, nor the lord without the consent of the tenant, could dig in these mines*, being new mines. Wms's. Rep. 406. Hill. 1717. Bishop of Winchester v. Knight.

13. A bill is brought by the lord of a manor to recover a fine for a copyhold on a suggestion, that the defendant was admitted by attorney, but sometimes pretends the attorney had no authority to take such admittance; the defendant answers as to part, and demurs as to relief. The demurrer held good. 3 Wms's. Rep. 148. Mich. 1732. North v. Strafford.

14. A single copyholder is not relievable in equity for an excessive fine, because this is determinable at law; but, to avoid multiplicity of suits, several copyholders may join to be relieved [242] against a general fine that is excessive. 3 Wms's. Rep. 155. pl. 88. Mich. 1732, Cowper v. Clerk;

For more of Copyhold in general, See *Common. Court. Customs. Manor. Stewards of Courts*, And other proper Titles,

Coroner.

(A.) His Antiquity and Qualification.

Coroners were the principal guardians of the

1. 14 E. 3. ENACTS, That no coroner shall be shown unless he has land in fee sufficient in the same county whereof he may answer to all people. cap. 8.

peace, and therefore the common law did not only require expert men to be coroners, but men of sufficient ability and livelihood, for 3 purposes: 1st, The law presumes that they will do their duty, and not offend the law, at the least for fear of punishment, whereunto their lands and goods be subject. 2dly, That they be able to answer to the king all such fines and duties as belong to him, and to discharge the country thereof, wherewith the country being their electors were chargeable. 3dly, That they might execute their office without bribery. 2 Inst. 174.

2. The coroner, though in original later than the sheriff, was nevertheless very ancient; he was the more servant or officer to the king of the two. His work was to inquire upon view of manslaughter, and by indictment of all felonies as done contra coronam, which formerly were only contra pacem, and triable only by appeal; as also he was to inquire of all escheats and forfeitures, and them to seise; he was also to receive appeals of felonies, and to keep the rolls of the crown pleas within the county. It is evident he was an officer in Alfred's time; for that king put a judge to death for sentencing one to suffer death upon the coroner's record, without allowing the delinquent liberty of traverse. This officer was made also by election of the freeholders in their county court, as the sheriff was, and from amongst the men of chiefest rank in the county, and sworn in their presence, but the king's writ lead the work. Bacon of Government. 66.

4 Inst. 271.

Cap. 59-
S. P. be-
cause he

deals priv-
ately with

3. His name is derived a corona, and so called, because he is an officer of the crown, and hath consue of some pleas, which are called placita coronæ. 2 Inst. 31.

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4. Coroners in every county, and sheriffs, were ordained to keep the peace, when the earls dismissed themselves of the custody of the counties and bailiffs in place of hundreds. 2 Inst. 31. cites the Mirror. cap. 1. f. 3.

5. A common merchant being chosen a coroner was removed, for that he was communis mercator. 2 Inst. 32.

6. They

6. They are of so great antiquity, that their commencement is not known; per Doderidge J. 3 Bulst. 176. Pasch. 14 Jac.

(B.) His Election.

1. *Westm. 1. cap. 10.* **F**ORASMUCH as mean persons and indiscreet now of late are commonly chosen to the office of coroners, where it is requisite, that persons honest, lawful and wise should occupy such offices; it is provided, that through all shires * sufficient men shall be chosen to be coroners of the most wise and discreet knights which know, will, and may best attend upon such offices, and † which lawfully shall attach and present pleas of the crown, and that sheriffs shall have counter-rolls with the coroners, as well of appeals as of inquests of attachments, or other things which to that office belong.

It seems that at this day the not being a knight is not cause for removing a coroner. For if he have sufficient lands within the county it suf-

ficeth, although he be not a knight notwithstanding that this statute which requireth that he be a knight. For those words are put into the statute, to the intent that he should have sufficient within the county, and for no other cause. F. N. B. 164. (A.) — 2 Inst. 176. S. P. — 2 Hawk. Pl. C. 42, 43. Cap. 9. f. 3. S. P.

* The office of a coroner ever was, and yet is eligible in full county by the freeholders, by the king's writ de coronatore eligendo, and the reason thereof was, for that both the king and the country had a great interest and benefit in the due execution of his office, and therefore the common law gave the freeholders to be electors of him. 2 Inst. 174.

† Seeing that coroners are elected by the county if they be insufficient, and not able to answer such fines and other duties in respect of their office as they ought, the county, as their superior, shall answer the same. 2 Inst. 175. — Ibid. 466. S. P. — 2 Hawk. Pl. C. 43. Cap. 9. f. 8. S. P.

By this it appears that the coroner is judge of the cause, and not the sheriff, and this agrees with our old and later books; only the sheriffs have counter-rolls with the coroners by force of this act, and therefore a certiorari may be directed to the sheriff and coroner to remove an appeal by bill before the coroner, because the sheriff hath a counter-roll; but if the certiorari be directed to the sheriff only in case of appeal or indictment of death, it is not sufficient to remove the record, because he is not judge of the cause, but has only a counter-roll. 2 Inst. 176.

2. 28 E. 3. cap. 6. Coroners shall be chosen in full counties, by the commons of the most meet and lawful people that can be found there, saving to the king and other lords, who ought to make such coroners their feignories and franchises.

3. 33 H. 8. 12. Coroner of the king's household shall be appointed by the lord steward.

4. The writ De Coronatore eligendo lies, where a man who is coroner of any county dies, or is discharged of his office, then that writ shall be awarded unto the sheriff, that he in full county by the freeholders of the county, chuse another in his place, and to certify the election, and his name, who is chose, in the Chancery. F. N. B. 163. (K.)

5. The Justices of B. R. are the sovereign coroners of the land. 4 Inst. 73. cap. 7.

6. Coroner or not coroner shall be tried by the country; for he is chosen in the county by the country. Jenk. 90. pl. 74.

S. P. by
Glyn Ch. J.
2 Sid. 101.
Trin. 1658.
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7. The *Chief Justice of B. R.* is the sovereign coroner of all England. 4 Rep. 57. 8. by the Reporter. Trin. 30 Eliz.

8. It is observable, that they *do not receive their authority from the king's commission, but from the election of the county*, in pursuance of the king's writ, issuing out of, and afterwards returned into the Chancery. 2 Hawk. Pl. C. 43. cap. 9. §. 5.

(C) His Duty and Authority.

Before this statute the coroner had the same

1. *Magna Charta*, *NO coroner shall bold pleas of our crown.* cap. 17.

authority he now hath, in case when any man come to violent or untimely death, *super visum corporis &c.* Abjurations and outlawries &c. Appeals of death by bills &c. This authority of the coroner, viz. the coroner solely to take an indictment *super visum corporis*, and to take an appeal, and to enter the appeal, and the court remains to this day; but he can proceed no further either upon the indictment or appeal, but to deliver them over to the justices; and this is saved to them by the Statute of W. 1. cap. 10. And this appears by all our old books, book cases, and continual experience. 2 Inst. 32. — Ibid. 176. S. P.

This is understood of felonies of the death of men; for the enquiry of that felony belongs to the office

2. 28 E. 1. cap. 3. §. 8. Enacts, that *forasmuch as heretofore many felonies committed within the verge have been unpunished, because the coroners of the county have not been authorised to inquire of such manner of felonies done within the verge, but the coroner of the king's house which never continues in one place, by reason whereof there can be no trial made in due manner,*

of the coroner of the verge. 2 Inst. 549. 550.

Hereby it appears, that by the * common law the coroner of the county could not intermeddle within the verge, but the coroner of the verge, and that if he took an indictment of the death of a man, it was not allowable in law; and so it is if the coroner of the king's house take an indictment of the death of a man out of the verge, it is *coram non judice*. And if an indictment of the death of a man being slain out of the verge, be taken before the coroner of the king's house, and the coroner of the county, and so entered of record, it is sufficient, because the coroner of the king's house joined with him, who had no authority. 2 Inst. 550.

* S. P. adjudged, Pasch. 24 Eliz. in B. R. *SWIFT'S CASE*, who was indicted before the coroner of the county of Middlesex, for a murder done in Tuthill in the said county, which indictment being removed into B. R. he pleaded, that Tuthill was, and yet is within the verge, and this was adjudged a good plea, and he was discharged of that indictment. 4 Rep. 46. b.

And yet the felony was not punishable; for at this

3. *Nor the felons put in exigent, nor outlawed, nor any thing presented in the circuit, the which has been to the great damage of the king, and nothing to the good preservation of the peace.*

time it might, after the remove of the king, be inquired of in B. R. if the bench sat in that county, or before justices of oyer and terminer &c. or if the coroner of the verge had taken an indictment, though the king went out of the verge, yet the indictment ought to be removed into B. R. for that is the center whereunto all records of that nature do fall, and there the offence might be heard and determined. 2 Inst. 550.

But this act was made for more speedy proceeding; for being removed into B. R. there ought to be 15 days &c. 2 Inst. 550.

In appeal of murder the defendant pleaded, that at Hampton Court, with

S. 9. *It is ordained, that from henceforth in cases of the death of men, whereof the coroner's office is to make view and inquest, it shall be commanded to the coroner of the country, that he, with the coroner of the king's house, shall do as belongeth to his office, and inrol it.*

in the county of Middlesex, within the verge, by inquisition taken before R. V. then coroner of the house of the king, and also one of the coroners of Middlesex super visum corporis, he was indicted of manslaughter, and arraigned thereupon before commissioners of oyer and terminer in Middlesex and confessed the indictments, and prayed his clergy. Resolved, that this indictment was well taken, and within the Statute of Articuli super Chartas, which says, that in case of death within the verge, it shall be sent to the coroner of the county, who with the coroner of the household of the king shall do his office as belongs to him; and though [245] it was objected that the statute requires two persons, and therefore one cannot execute it; for *securius expeditur negotia commissa pluribus, et plus vident oculi quam oculus*; and that *una persona non potest supplere vicem duorum*, yet in this case of several authorities it was resolved, that the indictment was well taken; for the intention and meaning of the act was performed, and the mischief recited in the act avoided as well as when one person is coroner of the household, and the county also, as if they had been two different persons; for though the court removes, yet he as coroner of the county may proceed &c. 4 Rep. 45. b. 46. a. cites Falch. 20 Eliz. B. R. Burgh v. Holcroft. — 3 Inst. 134. cap. 72. S. C.

S. 10. *And that thing that cannot be determined before the steward, where the felons cannot be attached, or for other like cause, shall be remitted to the common law.*

S. 11. *So that the exigents, outlawries, and presentments shall be made thereupon in eyre by the coroner of the county, as well as of other felonies done out of the verge;*

S. 12. *Nevertheless, they shall not omit by reason hereof to make attachments freshly upon the felonies done.*

4. The coroner inquires of all those who are killed feloniously, or by misadventure, out of houses, and who first found the body, and if they are taken, and if they are men or women, little or great, and let by mainprise till the next eyre of the justices, and the name of the parties shall be inrolled, as the name of the coroner shall be. Br. Corone, pl. 90. cites 22 Aff. 94.

5. A man was indicted before the coroner in roll of the coroners, and upon this was outlawed upon the roll of the coroner; quære if the coroner may award process of outlawry. Br. Corone, pl. 109, cites 27 Aff. 47.

Coroners may take appeal of death, and award process to the exigent, but

the plea shall not be determined before them. Br. Corone, pl. 82.

6. Coroner took an indictment that a man taken for felony was conducted to the church by certain friars, who were arraigned upon it, and because the coroner had no warrant to receive any indictment unless upon view of the body, or by writ sent to him &c. therefore writ issued to the coroner to certify, if he had other warrant or not. Br. Indictment, pl. 29. cites 27 Aff. 55.

Br. Corone, pl. 111. cites S. C.

7. If a man be taken by process, and after dies in prison, the coroner ought to see him, which ought to be returned by the sheriff to the court. Br. Corone, pl. 167. cites 3 H. 5.

8. A writ issues to the coroners of the county to arrest A. 39 H. 6. 41. the arrest is made by one of them, or a servant of one of them, it is good; but the return of it ought to be in the name of them all, and a warrant made to the servant of one of them to make the arrest, ought to be in the name of all. Jenk. 85. pl. 65.

9. In re-disseisin, error is brought, the error assigned is, that A, who sat with the coroners, was not a coroner, and

yet gave judgment; this is error; where two join in judgment, when one of them has no jurisdiction, it is error; by the Justices of both benches. *Nemo debet se immiscere rei alienæ.* Jenk. 90. pl. 74.

10. And if the arrest was made by a servant of one of them, and it is so returned, and the return says that *A. made rescous upon such arrest made by the servant of one of them*, upon a precept made by one of them, this is a *bad return*, and yet an attachment shall be awarded against the rescusser, and he shall be committed to prison, although he tenders a *traverse* to the said return; and this because of the detestation which the law has for disobedience and force against the king's mandate, and the credit which the law gives to the sheriff's return; [246] there may be a *traverse* to a rescous returned by Westm. 2. Ch. 40. Jenk. 85. pl. 65.

11. One coroner can hold an inquest upon the view of a dead body; *two coroners ought to be judges in re-disseisin*; one serves to pronounce an outlawry, but the entry ought to be in the name of all, and so of all process directed to the coroners. If there be only one coroner in the county; that one will serve in all those cases. Jenk. 85. pl. 65.

If the coroner finds sufficient indictment, by which the body is buried, he may dig him up again and find thereof sufficient 40 days after the burial, quod nota, by all the justices. Br. Corone, pl. 17. cites 2 R. 3. a. ——— Jenk. 162. pl. 8. cites S. C. but says it was 14 days after the burial. ——— 2 Hale's Hist. Pl. C. 58. cites S. C. of 21 E. 4. 70, 71. but mentions 14 days only.

12. If a man be killed, and interred before that the coroner has taken inquisition upon view of the body, the coroner may lawfully take him out of the sepulture, to see the wounds, to make a good indictment; by all the Justices, Br. Corone, pl. 166. cites 21 E. 4. 70, 71.

* Keilw. 67. b. pl. 9. Trin. 20 H. 7. S. P. by Fineux and Kingmill, and that though the procurement was out of that country. 13. A coroner upon an indictment of murder *super visum corporis*, finds the murder, and that *A. received the murderer* after the killing, and that *A. fugam fecit*. This finding of the coroner, as to the receipt and the flight, was held void, by all the Judges of England, Upon such indictment the coroner has nothing to do, except as to him who killed the man, The finding of the killing, and of flight, as to the man-slayer, or, * as to the accessories before the fact, is good; but † not as to accessories after the fact. Jenk. 177. pl. 54.

† S. P. Mo. 29. pl. 95. Trin. 3 Eliz. Anon. ——— Dal. 32. pl. 19. S. P. agreed, and cites Stamford, fol. 393. accordingly.

14. 33 H. 8. cap. 12. Coroner of the king's household, without the assistance of any other coroner, shall take the inquisition, and by a jury of the yeomen, officers of the household.

15. 1 & 2 P. & M. cap. 13. s. 5. Coroner must take the evidence in writing, and bind over the witnesses.

16. The coroner had no power to take any confession for treason, albeit the coroner had a special commission from the king to do it, 2 Inst. 629.

17. The

17. The *Mayer of London* is the coroner, but he shall not pronounce judgment on *outlawry*, but the recorder. 8. Rep. 126. a. in *Wagner's Case* cites D. 15 Eliz.

18. The coroner gave evidence to the jury *super visum corporis*, but they would give up no verdict, wherefore he adjourned them from time to time, and from place to place, but they would not agree upon a verdict. Upon this a letter was sent to him from Fleming Ch. J. not to take a verdict of them; upon which he went to the affizes at Hertford, and did acquaint the Judges with it for his discharge, the jurors were fined, and the indictment there taken at Hertford. 3 Bullst. 173. Pasch. 14 Jac. the King v. Taverner,

19. If a coroner has once to do with a writ, the sheriff cannot intermeddle; per Lea Ch. J. Palm. 370. Trin. 21 Jac. B. R.

20. The coroners are not the proper officers of the court in any other case but where the sheriff is absolutely improper, not where there is no sheriff at all; if the sheriff dies, the coroner cannot execute &c, 1 Salk. 152. pl. 2, Pasch. 3 W. & M. in B. R. The King v. Warrington.

21. Coroner need not go *ex officio* to take the inquest, but ought to be sent for, and that when the body is fresh; and to bury the dead before, or without the sending for the coroner, is a misdemeanor. The body may be dug up again, but it ought to be upon fresh pursuit, not at such a distance of time, for it is a nuisance, and may infect people. IN BARKLEY'S CASE, there was the leave of court for that purpose; per Holt Ch. J. 1 Salk. 377. pl. 21. Pasch. 1 Ann. B. R. The Queen v. Clerk. [247]

22. Out of the pares comitatus one was chose to be the coroner, who recorded all the pleas of the crown in the torn, all inquisitions of felo's de se, and people coming to an untimely end; and likewise all outlawries; and these coroners were in nature of comptrollers to the sheriff, keeping a record of the fines and amercements in the sheriff's court. Gilb. Hist. View of the Exchequer. 80.

(D) Authority. Where joint or several. And where the Act of one &c. is effectual, and shall bind or charge the other.

1. A Coroner may adjudge outlawry upon exigent. Br. Re-torn de Briefs, pl. 42. cites 14 H. 4. 34.

2. And one only may sit upon the body of a man slain. Ibid.

3. And one only may resummons an appeal. Ibid.

4. But those acts they do judicially and as judges, but the return they do as ministers, and therefore there seems to be a diversity; *quære*. Ibid.

5. Note, If there are 4 coroners in one county, and a writ is directed to them, if one dies, yet the other three may execute the writ. A venire facias to the try an issue

is returned by the coroners of a county; there are four of them, and only two return the *venire facias*, and the plaintiff has a verdict and judgment; this is not error; adjudged and affirmed in error. This was a good cause to stay the trial, but not after trial to reverse judgment; and this case is now aided, if need be, by the Statute of Jeofails. Jenk. 338. pl. 85.—Cro. J. 383. pl. 12. Mich. 13. Jac. B. R. in the Exchequer Chamber, Lamb v. Wileman.

the writ, because there still remains the greater number; but if before the execution of the writ *three shall die*, so that there is only one remaining, he cannot execute the writ until others are elected, 14 H. 4. 39. If there are 4 coroners, and a writ is directed to them, *three coroners cannot make a return of the execution of the writ*, 31 Aff. 20. But if one of them makes execution of it, and the return is by all of them, there it is good; as if one of them only sits at the county-court on the exigent, F. N. B. 163. (N) in the new Notes there (c) cites 14 H. 4. 34. per Hank. in a Capias, & 39 H. 6. 41.

6. *Writ issued to the coroners of the county of S. to arrest W. N. and J. G. One of the coroners of the county aforesaid returned the writ in his own name only, viz. that he had precept to M. his servant to take him, and he took him, and rescous was made by F. C. and K. upon which attachment issued against them, and they were taken, and the attachment returned, and after it was awarded that the rescuers should go to the Fleet; but by the Reporter this is as upon suggestion made to the Court, and not as upon the return; for it was agreed, that the return is not good; quod nota. Br. Return de Briefs, pl. 66. cites 39 H. 6. 40.*

[248] 7. *The judgment of two coroners is good, though there are four coroners in the county; contra of their *return; for this shall be by all the coroners, Br. Corone, pl. 200. citea 4 E. 4. 43.*

6 Mod. 37. Mich. 2 Ann. B. R. Anon. per Holt Ch. J. if there are 3 coroners, one whereof being a beggar, suffers an escape, it is very hard to charge the other with it, and he said the case came before him once, and he would not take upon him to determine it, though his brother Levin reports,

8. *In debt against C. and D. coroners of the county of Norfolk, the plaintiff declared, that he had recovered against N. sheriff of the said county, 600l. and that a Ca. Sa. was directed to the defendants, who arrested him, and suffered him to escape. The defendants plead severally Nil debet, and upon the trial it appeared on the evidence, that the writ was delivered to D. only, and he only in person arrested N. and that C. had no notice. nor had given any assent to it; nor did it appear, that any return was made to the writ; but upon the trial Holt Ch. J. because the coroners are but one officer in this ministerial office, directed the jury to find for the plaintiff, but afterwards, for the hardship of the case, and difficulty of the matter, he signed a bill of exceptions at London, comprising all this matter, upon which it was argued for the defendant, that he ought not to be charged for this act of his companion, done without his knowledge, for though in truth they both make but one officer, and ought to join in all ministerial acts, yet in this personal tort done by his companion, without his knowledge, the charge shall lie on him only who did the wrong, as in 3 Cro. 175. the under-sheriff who imbeziled the writ is only chargeable, though the high-sheriff alone is the officer of*

of the court. But it was argued e contra, that both being but one officer, the act of one is the act of both, and both chargeable, and so is 1 Mod. 98. *NAYLER v. SHARPLEY*, where the Court so inclined. Treby Ch. J. here inclined for the plaintiff, Powell inclined for the defendant; Rookby dubitavit, & adjournatur ulterius arguend. 3 Lev. 399. Trin. 6 W. & M. in *C. B. Tailour v. Clerke and Denny*.

that he would have over-ruled him in the exception, and said, that the case had been argued several times

in *C. B.* but adjudged; but the Court thought it hard to charge the other. The report says, see *BUTCHER AND PORTER'S CASE*, in time of the late king. — 1 Salk. 94. Hill. 4 W. & M. in *B. R. Butcher v. Porter* is a D. P. — Carth. 249. S. C. is a D. P. — Show. 400. S. C. is a D. P. — Lord Raym. Rep. 217. S. C. cited by Holt Ch. J. but not S. P.

(E) Inquisitions before him.

1. 48 E. 1. **A** Coroner ought to enquire these things; first, he shall go to the place where any man is slain, or suddenly dead, or wounded, or where houses are broken, or where treasure is said to be found, and shall command 4 of the next towns, or 5 or 6, to appear before him in such a place; and when they are come, the coroner, upon the oath of them, shall enquire if they know where the person was first slain, whether it were in any house, field &c. and who were there. Likewise it is to be enquired, who were culpable, either of the act or of the force, and who present, and of what age they be, (if they can speak and have discretion.) And as many as shall be found culpable by the inquest shall be committed to gaol, and such as shall be found there, and be not culpable, shall be attached until the coming of the Justices, and their names shall be written in the rolls. If any man be slain suddenly, which is found in the fields, or in the woods, first it is to be seen, whether he were slain in the same place or not, and if he were brought there, they shall do as much as they can to follow their steps that brought him. It shall be enquired also, if the dead person were known, and where he lay the night before; and if any be found culpable of the murder, the coroner shall go to his house, and enquire what goods he hath, and what corn he hath in his grange; and if he be a freeman they shall enquire what land he hath, and what it is worth yearly, and what crop he hath upon the ground, and they shall cause all the land, corn, and goods to be valued, and delivered to the townships, which shall be answerable before the Justices; and likewise of his freehold, how much it is worth yearly, and the land shall remain in the king's hands until the lords of the fee have made fine for it. And these things being enquired, the body shall be buried.

Exception was taken to an inquisition before a coroner, because it was not said per sacramentum proborum & legalium hominum villarum proxime adjacentium but only says proborum & legalium

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lium hominum de parochia de Acminter. whereas the Statute 4 E. 1. intituled Officium Coronatoris enacts, that such inquest shall be taken by 4 of the next villis at least, and that so was the common law, and cited Britton 7. a. But the court

over-ruled this exception, because they will intend that the inquisition was of the next villis according to the statute, but the coroner is not bound to return it particularly. Sid. 204 Trin. 16 Car. 2. B. R. *The King v. Crofs and Dabbyn*. — Poph. 209, 210. Hill. 2 Car. B. R. the same exception taken, and day was given to the Attorney General to maintain the inquisition; but the indictment was afterwards quashed, especially for another exception.

A coroner's inquest found B. felo de fe, it was objected upon 4 E. 1. De Officio Coronatoris, by which it is enacted, that the inquest shall be taken by men villarum proxime adjacentium, which this was not, but by men villarum adjacentium, and this statute being made to prevent a mischief, which was before at common law, ought to be strictly pursued, or else it is made to

no purpose; to which it was answered, and so adjudged, that it is not requisite to shew, that the jury were men of the villa proxime adjacentium, for it shall be so intended till the contrary is shewn, that an inquisition super visum corporis might be taken at common law before the coroner, and then it is villarum adjacentium, which shall be intended proxime adjacentium, and upon view of 148 precedents accordingly all the Court agreed, that the inquisition was well taken; and judgment that it be filed. 2 Sid. 90. 101. 144. Hill. 1658. Berkley's Case.

It is observable, that this statute being wholly directory, and in affirmance of the common law, doth neither restrain the coroner from any branch of his power, nor excuse him from the execution of any part of his duty, not mentioned in it, which was incident to his office before; and from hence it follows, that though the statute mentioned only his taking enquiries of the death of persons slain or drowned, or suddenly dead, yet he may, and ought to enquire of the death of all persons whatsoever who die in prison, to the end that the publick may be satisfied, whether such persons came to their end by the common course of nature, or by some unlawful violence, or unreasonable hardships put on them by those under whose power they were confined. 2 Hawk. Pl. C. 47. cap. 9. l. 22.

And the like reason also seems to be the best ground of the resolution which we find in some books, that there is no necessity that it appear in a coroner's inquest, that it was taken by the oaths of persons of the next adjacent towns, but that it is sufficient to say that it was taken by the oaths of lawful persons of the county, inasmuch as such inquisitions being good before the said statute, which is wholly declaratory, must needs be so still, but it seems that it ought to appear in every such inquisition, at what place, and by what jurors by name it was taken, and that such jurors were sworn, and that the reason given in some books that such inquests shall be intended to have been taken by the men of the next towns seems very harsh, if it be supposed necessary to be taken by such persons; for that such intendment would be contrary to the general rule of the law, which will not suffer any material part of an indictment to be taken by intendment. 2 Hawk. Pl. C. 47. cap. 9. l. 22.

S. 2. *In like manner it is to be enquired of them, that be drowned or suddenly slain, whether they were drowned, slain, or strangled, by the sign of the cord about their necks, or any other hurt found upon their bodies; and if he were not slain, then ought the coroner to attach the finder, and all other in the company. A coroner also ought to enquire of treasure found, who were the finders, and who is suspected thereof; and that may be perceived where one lives riotously, haunting taverns, and hath so done of long time, hereupon he may be attached for this suspicion by 4 or 6, or more pledges. Further, if any be appealed of rape, he must be attached if the appeal be fresh, and they see an apparent sign by effusion of blood, or an open cry made, and such shall be attached by 4 or 6 pledges if they be found. If the appeal were without cry, or without any manifest sign, 2 pledges shall be sufficient. Upon appeal of wounds, especially if the wounds be mortal, the parties appealed shall be taken and kept until it be known, whether he that is hurt shall recover or not; and if he die, the defendant shall be kept, and if he recover they shall be attached by 4 or 6 pledges. If it be of a maim, he shall find more than 4 pledges; if it be of a small wound 2 pledges shall suffice. Also, all wounds ought to be viewed, the length, breadth, and deepness, and with what weapons, and in what part of the body the wound is, and how many be culpable, and how many wounds there be, and who gave the wound, all which things must be enrolled in the roll of the coroners. Moreover, if any be appealed as principal, they that be appealed of the force shall be attached also, and kept until the principal be attainted.*

Where a jury finds a man slain upon the view of a coroner, they ought

2, 3 H. 7. cap. 1. *Every coroner, upon view of the dead body, shall enquire of the person that hath done the death or murder; also of their abettors and consenters, and who were present when it was done; and the names of the persons so present and found shall enroll and certify.*

to find who killed him, or that he killed himself; or they may find that he who is named in the indictment killed himself *se defendendo*. Jenk. 202. in pl. 24. cites 37 H. 8. Br. N. C. 297.

3. *When one is slain in the day-time, and the murderer escapes untaken, the township that suffers it shall be amerced, and the coroner shall enquire thereof upon the view of the body dead.*

4. *Also justices of the peace have power to enquire of escapes, and to certify them into B. R. and after the felonies found the coroners shall deliver their inquisitions before the justices of the next goal delivery there, who shall proceed against the murderers, or else certify such inquisitions into B. R.*

5. In case of homicide no goods are forfeited till it be lawfully found by the oath of 12 men that he is *felo de se*, and this belongs to the coroner *super visum corporis* to enquire thereof, and if it be found before the coroner *super visum corporis*, that he was *felo de se*, the executors or administrators of the deceased shall have *no traverse* thereunto. 3 Inst. 34, 35. cap. 8.

6. As the sheriff may in his tourn enquire of all felonies by the common law, saving of the death of a man, so the coroner can enquire of no felony, but that of the death of a man, and that * *super visum corporis*. He shall enquire also of the escape of the murderer, of treasure trove, deadlands, and wrecks of the sea. 4 Inst. 271. cap. 59.

210. Hill. 2 Car. B. R. Anon.

7. Inquisition *super visum corporis* was held to be void, because it was *not alledged where* the inquisition was taken, nor by what person, nor their names, nor that they were sworn. Cro. E. 31. pl. 4. Trin. 26 Eliz. B. R. Pinner's Case.

8. An inquisition of murder was taken before T. D. coroner of the Lord Berkley, but shewed not that he was coroner of the county, or of what liberty; nor was it shewn how the Lord Berkley can make a coroner, by patent or prescription; and the indictment *quod percussit cum gladio without saying felonice*; and for these causes the indictment was discharged. Cro. E. 193. pl. 7. Mich. 32 & 33 Eliz. B. R. Dearing's Case.

9. Inquisition finding that the person was possessed of a lease generally as yet continuing, without shewing the certain beginning and determination, is good enough, and the safest way. For finding the date wrong vitiates the sale. Cro. E. 584. pl. 13. Mich. 39 & 40 Eliz. B. R. Palmer v. Humphrey.

10. Inquisition was taken before the coroner in Oxfordshire upon the death of the Earl of B. and being removed into B. R. it was moved to quash it, for that it was *presentatum existit per juramentum A. B. C. naming the rest of the jury, but omitted (proborum & legalium hominum) nor did it say, quod seipsum percussit*. Dodderidge and Haughton held it insufficient for both reasons, and though the indictment is *virtute officii* by the coroner, yet he is bound to the rule of the law in the execution of his office, and cannot impanel outlaws and

* Upon exception that the inquiry was not so, the inquisition was quashed.

Poph. 209.

21. A person having killed himself, as there was reason to believe, feloniously, for that he had made a formal will just before, and the coroner *having sworn the jury to enquire*, finding the evidence given very strong, *took off some of the inquest*; and per Holt, it is not in a judge's power to take off a jurymen after he was sworn; and though this coroner be a weak silly man, yet that is no reason why there should not be an information against him, for such men must learn, they must not thrust themselves into offices; and the return of the inquisition, finding the deceased non compos, not being filed, it was quashed, per Cur. 12 Mod. 423. Pasch. 13 W. 3. The King v. Stukely.

22. And Holt cited a CASE OF ONE COMBS, who had killed himself at Highgate, in the year 1655, and the inquest was set aside *for practice*. 12 Mod. 493.

[253] (F) Traverse of Inquisitions before him.

* For this is an ancient law of the crown. Br. Traverse per &c. pl. 229. cites 6 E. 4. 8.

1. **THE** *flying for felony found before the* * coroner upon the indictment is not traversable; *contra* of such *flying found* upon indictment *before commissioners*, for they ought not to enquire of this before arraignment. Br. Traverse per &c. 383. cites 36 H. 6. 31.

The Court inclined, that an inquisition finding a man *felo de se* was traversable; for per Hale, the reason why an inquisition that finds a *fugam fecit* is not traversable, is, because all the parties that were present at the death of the party are bound to attend the coroner's inquest, and their not appearing there is a flying in law, and cannot be contradicted; but that reason does not hold in a *felo de se*. Freem. Rep. 419. pl. 556. Mich. 1675. Anon. — It was held, that an inquisition found of a *felo de se* was traversable, though my Lord Coke holds the contrary, and it being removed hither by certiorari, they were admitted to traverse it. Freem. Rep. 443. pl. 608. Mich. 1676. Irton's Case. — * But Salk. 377. pl. 21. Pasch. 1 Ann. B. R. in Case of the Queen v. Clerk, the Court held, that such an inquisition would be good without the word *murdravit*, and that so is DAME TALE'S CASE: — 7 Mod. 16. The Queen v. Clerk. S. P. by Holt Ch. J. — But an inquisition, before the coroner taken *super visum corporis* that finds the person was *felo de se*, & *non compos mentis* may be traversed; but the *fugam fecit* in an inquisition before the coroner cannot be traversed: resolved per Cur. Vent. 278. Hill. 27 & 28 Car. 2. B. R. Anon.

3. The coroner's inquest *super visum corporis* found that P. feloniously threw himself into a river, and therein *seipsum emergit*, & *sic seipsum occidit* & *murdravit*; but because (*emergit*) is getting out of, and not drowning himself in the water, the inquisition was quashed, after the party had been dead and buried two years; but because the man had been dead and buried

buried so long that there could be no view, the Court held that it might be supplied by a commission of enquiry, and it was ruled that his death should be presented at the next assizes &c. and the inquisition traversed and tried at the same assizes, 2 Lev. 140. Trin. 27 Car. 2. B. R. The King v. Parker.

4. Inquisition of a *felo de se* was returned hither by certiorari, and it was moved for a *melius inquirendum*, on *affidavit of melancholly and distraction*, but denied, and held by the Court not grantable unless there had been some irregularity in the caption of it, and ordered the administrator to traverse the inquisition, as is usual in the Exchequer in cases of inquest of office, as *talis venit & queritur seipsum colore &c. gravari & minus rite &c.* And agreed by all the Bench, that he might do so, but held by some of the Bar, that it is not traversable; upon an action for goods of the deceased's it will hold good, and cannot be traversed. 2 Show. 199. Pasch. 34 Car. B. R. The King v. Ripley.

4 Jo. 198. Ripley, alias, Oldfield's Case, S. C. the Court did not approve this course of a *melius inquirendum*, because this inquisition was traversable as well as an inquisition against

another for murder, and it was said, that Lord Ch. J. Hale had declared here that he was of this opinion; and therefore the Court advised the administrator of Ripley to remove the inquisition hither by certiorari, and then to suggest himself to be grieved by it, and so to bring the matter and truth of the inquisition into judgment. — Skin. 45. pl. 16. S. C. accordingly; and says, that the lord of the manor had used art in obtaining the verdict.

5. An inquisition on a *melius inquirendum* is traversable, but [254] not an inquisition *super visum corporis*. Carth. 72, 73. Mich. 1 W. & M. in B. R. cited the Case of the King v. Heatherfall, and this agreed by the Court to be good law.

(G) Punished for Misdemeanors in his Office in Civil Cases.

1. **NOTE**; an attachment was awarded against the coroners of York, because A. was 5^o. *exaltus*, but they would not give judgment of the outlawry, and an affidavit of that was made. And Millington, an ancient attorney said, that the coroners of Stafford for such an offence were fined every one 10l. but after the judgment of the outlawry pronounced they may stay the return of the exigent for to be advised, if the case requires. Noy. 113. Trin. 2 Jac. C. B. Anon.

2. In case against 4 coroners, for that J. S. was outlawed at the plaintiff's suit, and a *capias utlagatum delivered* to the coroner, and though they might easily have arrested him, and that he was once in company with one of them, *falsely returned a non est inventus*. It was objected, that the action ought not to be brought against all four, for it was said the writ was delivered but to one, and the allegation was, that the plaintiff was in company with one of them &c. But it was answered, that all four made but one officer, and besides, they all joined in making the false return; and judgment for the plaintiff nisi. Freem. Rep. 191, 192. pl. 195. Pasch. 1675. C. B. Naylor's Case.

(H) Where Writs shall be directed to the Coroners.

1. *EXTENDI* facias upon a statute merchant *issued*, and the sheriff did not return the writ, and the party made thereof suggestion, and prayed writ to the coroners, and could not have it, but only a re-exent. Br. Statute Merchant, pl. 34. cites 27 E. 3. and Fitzh. Suggestion 20.

2. If the sheriff does not serve the replevin at the pluries, process shall issue to the coroners, and there the sheriff has lost his power to sue any process in it after, by the best opinion. Br. Office and Off. pl. 43. cites 43 E. 3. 26.

Br. Replevin pl. 9.
cites S. C.
— Br.

Withernam, pl. 2.
cites 43 E.
3. 46.

3. Where the sheriff does nothing in replevin at the alias, nor at the pluries, process shall issue to the coroners to attach the sheriff, and to make replevin. Br. Process, pl. 21. cites 43 E. 3. 26.

4. Note, that process directed to the coroners to serve, this ought to be served by all the coroners; but where they are to give judgment, the judgment of two of them suffices where they are four; for in the one case they are judges, and in the other only ministers. Br. Process, pl. 172. cites 14 H. 4. 34.

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Br. Office
and Off. pl.
14. cites
& C.

5. Process shall not be made to the coroners where there is no sheriff, or where the sheriff is dead; for the sheriff is an officer immediate to the court, for process shall not issue to the coroners unless in special case; as where the plaintiff says, that the sheriff is his cousin, and prays process to the coroners, and the other does not deny it, there process shall issue to the coroners, and otherwise not. Br. Process, 70. cites 22 H. 6. 51. By all the Justices.

6. If a sheriff of a county in a city be in contempt, the attachment is to go to the coroner, and not to the mayor or chief officer of the corporation in such city or town, and if the offender be out of his office, the attachment shall be directed to the new sheriff. 2 Vent. 216. Mich. 2 W. & M. in C. B. Anon.

If one or
three are
challenged,
yet the
others may
execute the

7. In the case of 2 coroners, if the one be challenged, the other must act, and yet both make one officer. 1 Salk. 152. pl. 2. Pasch. 3 W. & M. in B. R. in Case of the King and Queen v. Warrington.

writ, and one coroner may do an act alone in the name of the whole, and set the names of the others thereto. Arg. says it is agreed so in the books. 2 Show. 286. pl. 283. Pasch. 35 Car. 2. B. R. in the Case of Rich v. Player.

(I) Discharged and Removed. For what Cause, and How. And what shall determine his Office.

Br. Commission pl.
19. cites
S. C. —

1. A Coroner is not made by commission but by writ, and when he is elected by writ, it is returned in Chancery, and is a judicial act of record, and therefore when the king dies this

this shall remain, where all manner of commissions cease by demise of the king, as commissions of justices, and the like; but judicial acts shall remain, and so the coroner *shall remain till he be removed by writ of the king.* Br. Office and Off. pl. 25. cites 4 E. 4. 43. and 44.

Br. Coroner, pl. 200. cites S. C.—F. N. B. 163. (N) in marg. of the last edition cites

S. C. accordingly.——2 Hawk. Pl. C. 3 cap. 1. f. 11. S. P. and Ibid. 43. S. P.—2 Inst. 176. S. P.—Dal. 15. pl. 7. Anno 1 Mar. S. P. by Portman, and not denied by Bromptley Ch. J. and cites D. 1 Eliz. fol. 152. pl. 2. accordingly.——Lev. 120. Mich. 15 Car. 2. B. R. the S. P. resolved accordingly.

2. On a suggestion that a coroner *had not sufficient lands* within the hundred, a writ issued to chuse another, and one was chosen. Rhodes and Windham, held that this is a good *discharge*; though F. N. B. 163. (N) says, that he ought to be discharged by writ. Godb. 105. pl. 123. Mich. 28 & 29 Eliz. C. B. Anon.

3. The coroner shall be discharged of his office by the king's writ sent unto him, and thereupon shall issue another writ directed unto the sheriff to chuse a new coroner, and that writ shall recite the cause of the discharge of the other coroner. F. N. B. 163. (G)

But this cause is not traversable. Ibid. in the new notes there cites (b) 5 Rep. 68.

4. If a coroner is in a languishing condition, or so broken with old age that he cannot exercise the office, or becomes paralytick, it is good cause to remove him. 8 Rep. 41. b. in a Nota of the Reporter.

F. N. B. 163. (N) there is a writ to that purpose.—

2 Hawk. Pl. C. 44. cap. 9. f. 12. S. P.

5. If a coroner be discharged of his office by false suggestion, [256] by the king's writ directed to the sheriff, then the party may come into the Chancery, and require a commission to enquire of the said false suggestion, and to return the enquiry before the king into the Chancery, and if it be found to be false, then the king may make a supersedeas to the sheriff, that he do not remove the coroner if &c. and if he be removed that he suffer him to exercise his office as he did before F. N. B. 164. (D)

(K) Punished.

1. 3 H. 7. A Coroner shall not be remiss, but shall duly execute cap. 1. his office according to law, in pain of 5l. and shall have for his fee, (upon view of the body) 13s. 4d. of the goods of the murderer, if he have any; if not, then out of such amerciaments as shall be set upon the township that suffered the murderer to escape.

2. 1 H. 8. cap. 7. Justices of assize and peace have power to enquire of and punish the defaults and extortions of coroners.

3. The coroner is to return his inquisition at the next gaol delivery, and because he did not, the Court discharged him, and

Set a fine of 100l. upon his head, they having found it murder, and kept the inquisition in his pocket. Per Cur. in a Nota. Keb. 280. pl. 81. Pasch. 14 Car. 2. B. R. The King v. Lord Buckhurst & al.

For more of Coroner in general, See other proper Titles, and 2 Hawk. Pl. C. 42 to 55. cap. 9. and 2 Hales's Hist. of Pl. of the Crown 53 to 69. cap. 8. concerning the Coroner, and his Court and Authority in Pleas of the Crown.

Corporations.

Fol. 512.
Sec (E)

(A) By what *Means* a Corporation may commence, and by what *Words* and *Names*, and by whom, & c contra.

[Or rather, of the several Sorts of Corporations,]
[And of what Person or Persons it consists,
Pl. 1, 2.]

* A parson has succession, and is a corporation in him and his successors; for he may prescribe in him and his predecessors, and may purchase to him and his successors. Br. Dean & c. pl. 19.

[1. **A** Corporation consists of one single person only, as the king, bishop, * parson &c. Co. 10. 29. b. A Prebendary. Co. 10. 31. b.]

[2. Or aggregated of many, as Mayor and Commonalty, Dean and Chapter, and these in the civil law are called universities or colleges. 10 Co. 29. b.]

[257] + S. P. Br. Encumbent, pl. 14. cites 39 H. 6. 14. — And per Danby, a man may give land to a parson and his successors, 7 E. 4. 12. and the same per Littleton in his Chapter of Frankalmoine. Ibid. — Br. Corporations. pl. 68. cites 39. H. 6. 14 & 7 E. 4. 12.

Of corporations some are *spiritual*, and some are *temporal*. The spiritual are, as abbots, or priors, and their convents, and such like, which consist of persons religious, regular, and dead as to the world. The temporal are, as dean and chapter, mayor and commonalty, masters and confreres, and such like, of which some consist wholly of persons spiritual and secular, some of persons temporal wholly, and some mixed of persons ecclesiastical and temporal, for which see, Thel. Dig. 19. Lib. 1. cap. 22. f. 2. refers to 5 H. 7. 26. 13 H. 8. 13. and 14 H. 8. 3. — Co. Litt. 250. 2. S. P.

[3. There are 4 sorts of corporations by the common law, as the king. Co. 10. 29. b.]

Jenk. 270. [4. By authority of parliament.]
pl. 88. S. P.

— Co. Litt. 250. 2. S. P.

[5. By

[5. By the king's charter.]

— Co. Litt. 250. a. S. P. — Some are *by grant of the king*, who also is a body politick in himself. Thel. Dig. 19. Lib. 1. cap. 22. f. 2. refers to the reports of Plowden, fol. 242.

Jenk. 270.
pl. 88. S. P.

[6. By prescription.]

— Co. Litt. 250. a. S. P. — Some corporations are *by prescription*. Thel. Dig. 19. Lib. 1. cap. 22. f. 3. says it appears 34 H. 6. 27. and in divers other books.

Jenk. 270.
pl. 88. S. P.

7. A *commonalty* may be a corporation *without mayor or bailiffs*. Thel. Dig. 20. Lib. 1. cap. 22. f. 16. cites Pasch. 2 H. 6. Grants 3, and says, See Mich. 39 H. 6. 13. where Prisot said, that a corporation without a head is not good.

8. The *College of Greystock* was founded by Pope Urban, at the request of Ralph, Baron of Greystock, ancestor of the Lord Dacres, and was always afterwards called or known and certified in the book of First Fruits and Tenths, *by the name of the College of Greystock*, and it consisted of a master and 6 priests, always residing at Greystock, who came in by admission and institution of the bishop, and were not eligible, and the priests had yearly stipends of 5 marks a year, besides their bed and chamber, and the master 40 marks a year, but they had no common seal, and therefore it was adjudged, that was not a college well incorporated, and therefore not given to King Ed. 6. by the Statute 1. Ed. 6. of Dissolutions. D. 81. a. pl. 64. Hill. 6 Ed. 6. The King v. Lord Dacres, alii. Greystock College's Case.

S. C. cited 4 Rep. 107. as resolved, that this had no lawful commencement; for the Pope could not found or incorporate a college within this realm, but it must be done by the king himself, and by

no other. — Jenk. 205. pl. 35. S. C.

9. The Bp. of St. David's by licence from the king to appropriate certain advowsons, did, by the king's assent, and also of the dean and chapter, make a collegiate church, and constituted prebendaries thereof, and appropriated a corps to every prebendary, all which was afterwards confirmed by the king's letters patent. Resolved by all the Justices of both Benches, except Harper, that this shall be taken as a college, and given to the king by the Statute 1 Ed. 6. D. 267. a. b. pl. 12. Mich. 9 & 10 Eliz.

10. There are 4 things of substance to be observed in every corporation founded *ad pios usus*. 1st, It must be known by a name, as president and scholars, or master and scholars, or rector and confresers &c. 2dly, There must be a place certain where the persons shall be resident, which must have a known name, as College, Nunnery, Hospital &c. 3dly, It must have the name of a saint, to whom it is dedicated, or founder, as Collegium Petri, or Pauli, or Gonvell-Hall, or Christ-Church &c. 4thly, It must have a place known in which the house shall stand known by some name before the foundation, as in Oxford, in Cambridge, in London &c. Per Manwood Ch. B. Mo. 231. Hill. 29 Eliz. in Fanshaw's Case.

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12. In the name of a corporation 4 things only are to be respected. 1st, The names of the living persons, who are the corporation, as master and chaplains &c. 2dly, The house in which they

they are resident, and make their abode. 3dly, The name of the founder. 4thly, The place whereupon the house of their abode is built and erected. And if these 4 matters are sufficiently set down, though not formally, it is good enough; by the Lord Ch. B. in his argument in the Court of Exchequer. Le. 160. pl. 228. Mich. 30 & 31 Eliz. in Case of Marriot v. Paschall.

13. It was said to be adjudged that the inhabitants of a town *cannot be incorporated without consent of the major part of them, and that without their consent the incorporation is void.* 2 Brownl. 100. Trin. 9 Jac. Anon.

14. It may be *with a head or without a head, and the head and members may be appointed after the foundation; and the foundation may be before any material fabrick is erected.* Jenk. 270. pl. 88. Case of Sutton's Hospital, Mich. 10 Jac.

15. *Franchises &c. are not essential to a corporation but a privilege pertaining to it; the essence of a corporation is to make by-laws, and govern their members &c. the which they may do, though their franchises are seized; as the Dean and Chapter of Norwich was a chapter to the bishop, and therefore remains a corporation after their lands surrendered; otherwise of a corporation for a particular purpose, as an hospital, which by surrender of their land had been destroyed before they were restrained by 13 Eliz. per Holt Ch. J. and for this he cited Fitzherbert Corporation,* cited in the Bishop of Norwich's Case. Skin. 311. Hill. 3 W. & M. in B. R. in Case of the King v. the City of London.

(A. 2) Corporation. What it is.

A corporation is an artificial body, composed of divers constituent members, ad in-
star corporis humani, and the ligaments of this body politick or artificial body, are the franchises and liberties thereof, which bind and unite all its members together; and the whole essence and frame of the corporation consist therein; per Pemberton Serjeant. Arg. Carth. 217. Hill. 3 W. & M. in Sir James Smith's Case.

1. **A** Corporation is a body politick, consisting of material bodies, which, joined together, must have a name to do things that concern their corporations, or otherwise it is no corporation. And. 206. pl. 238. Hill. 29 Eliz. per Ch. B. in Case of Marriot v. Paschall.

2. All the *natural persons of the corporation* are not the corporation but are persons of which the corporation consists, but not wholly; for the name is a part also without which the corporation cannot be, Arg. per Justiciarios. And. 210. Hill. 29 Eliz. in Case of Marriot v. Paschall.

3. The *Mayor and aldermen of London* are not a corporation, but a Court; resolved. Carth. 172. Hill. 2 & 3 W. & M. in B. R. Rich v. Pilkington.

4. A corporation is properly an investing the people of the place with the local government thereof, and therefore their law shall bind a stranger, and can only be *created by the crown;*

crown; but a corporation may make a *fraternity*; per Cur. 1 Salk. 193. pl. 5. Hill. 2 Ann. B. R. in Case of Cuddon v. Eastwick.

5. The *Ancients and Principals of Furnival's Inn* brought an action upon a bond given to discharge the duties of the house, but being tried before Holt Ch. J. the plaintiffs were nonsuited, because *not being a body politic*, they were not capable *to sue*. Cited Arg. Gibb. 296, Trin. 5 Geo. 2. C. B.

(B) Who may make a Corporation.

[1. *NONE but the king* can make a corporation. Co. 10. * Br. Devise, pl. 21. cites S. C. per Perley, 33. b. 49 E. 3. 4. * 49 Aff. 8.]

Caundish, Belknap, and Knivet. — Jenk. 205. pl. 35. S. P. cites D. 267. and 10 Rep. 1. Sutton Hospital's Case. — Jenk. 270. pl. 88. S. C. — 4 Rep. 107. b. cites Greystock College's Case S. P. — Jenk. 205. pl. 35. S. C.

[2. The king may give power to a common person to name the persons, and the name of the corporation, and when he hath done so, this corporation is not said to be made by the common person, but by the king. Co. 10. 33. b.] Jenk. 270. pl. 88. S. P.

[3. If the Mayor and Commonalty of London prescribe to make another corporation in the city, and their customs are confirmed, yet it is not good without the king's charter.* 49 E. 3. 4. † 49 Aff. 8.] * Br. Corporations, pl. 15. cites S. C. — Ibid. Prescription,

pl. 12. cites S. C. — Scire facias; R. F. of London was seised of certain land in London devisable, and devised to his sene for life, to find a chaplain, the remainder to two of the best of the art of whittawyers of London, to find a chaplain for ever, and died, and the sene found a chaplain for life and died, the two wardens of whittawyers entered, and did not find for the chaplains, by which it was found by office, and that the deviser died without heir, whereupon scire facias issued against them, to say why the king should not have the land by escheat for the non-capacity of the reversion, and they came and alleged prescription, that by the usage of London people of every art may make commonalty, guild, and fraternity, and devise to them, and that the kings have confirmed their usage. And by award none can make commonalty nor corporation, but the king himself, quod nota; and yet it is usual that corporations may prescribe that they have been a body politic time out of mind, and have been capable, and pleadable and impleadable time out of mind, but one corporation cannot make another corporation. And per Caund. such corporations which London makes are not perpetual, but commence by the assent of the people of an art at their wills, so that if any of the art will leave it, they may at their pleasure, quod non negatur; and per Belk they cannot make statute of inheritance, nor make land departable, nor to be devisable, nor the king by his charter cannot do it, quod Caund. concessit, and that the king may give to the queen, and she may have action alone. Br. Prescription, pl. 12. cites 49 E. 3. 3.

† Br. Devise pl. 21. cites S. C. that a man cannot prescribe to make guilds or fraternity without charter from the king; for commonalty cannot make commonalty. — Br. Corporations, pl. 45. cites S. C. that commonalty or corporation cannot make another corporation or commonalty, by usage nor prescription, nor otherwise unless by charter of the king, which wills it by express words; per judicium curie. — Mo. 584. Arg. cites S. C. — Sid. 291. pl. 7. Trin. 18 Car. 2. B. R. in the Case of the King v. Beardwell is a note, that in that case it was said that there cannot be a corporation out of a corporation where the first was by grant; and it was doubted whether there can be a corporation out of a corporation where the first was by prescription. For in London several of the companies are corporations by prescription, out of the grand corporation by prescription viz. both by prescription.

4. Note, that a corporation or commonalty cannot make another corporation nor commonalty unless by grant of the king by express words; and not by prescription or custom; and per Cand.

the king may by his charter *divide a corporation*, and make the Prior of *Westminster to sue the Abbot for his possessions. Br. Grants pl. 81. cites 49 Aff. 8.

The king only can grant or give licence to found a spiritual corporation. 5 Rep. 26. a. Hill. 33 Eliz. in Cawdry's Case, cites 9 H. 6. 16 [b. pl. 8] — Only

5. The king cannot give licence to another to make a corporation; for a corporation ought to be made by the words of the king himself. Thel. Dig. 20. Lib. 1. cap. 22. f. 26. cites Hill, 2 H. 7. 13. per Keble, contra per Rede J. Mich. 20 H. 7. 7. & 38 E. 3. 14. And it was said by Brian and Choke, that the king may give licence to one to make a chantery for a priest in a certain place, and to give land to him and his successors &c. And that this shall be a good corporation without more words. Thel. Dig. 20. Lib. 1. cap. 22. f. 26. cites Trin, 22 E. 4. Grant 30. and that so agrees 3 H. 7. Grant 36 & 38 E. 3. 14.

the king can make a corporation, Jenk. 270. pl. 88. cites 10 Rep. 1. Sutton Hospital's Case. — Ibid, 205. in pl. 35. cites S. C. & S. P.

6. A man at common law could not erect a spiritual body polittick, to continue in succession, and capable of endowment, without the king's licence, but by the Statute of Mortmaines they might have endowed this spiritual body once incorporated perpetuis futuris temporibus without any licence from the king, or any other. 3 Inst, 202. cap. 97.

But now any man may erect and build an house for an hospital, school, working-house, or house of correction, and the like, without any licence, but that is but a preparation, and may be done as owner of the soil; but by the common law he could not incorporate any of them without licence, but now he may *endow them with lands in certain cases, by the statutes of the 39 Eliz. cap. 5. and 3 Car. cap. 1. 3. Inst, 202. cap. 97.

* See Tit. Mortmain (A. 2)

(C) Of what Persons a Corporation may be made.

S. P. and bo. h shall stand. Jenk. 270. pl. 88. [1. ONE corporation may be made out of another corporation; Co. 10. Bridewel, [cited in the Case of Sutton's Hospital] 31. b.]

—Several corporations may be created one out of another; as the Dean and Chapter of Lincoln are a joint corporation, viz. the dean is a corporation by himself, and every one of the prebendaries is a corporation by himself. 19 Rep. 31. b. ad finem, cites 9 E. 3. 18. b.

(D) Of what Place.

Jenk. 270. pl. 88. it must have a place certain. [1. THERE ought to be a place of corporation, Co. 10. 29. b. 123.]

but a fictitious place will serve. — Mo. 231. per Manwood Ch. B. the S. P. — Jc. 160. pl. 228, S. P. by the Ch. B.

[2. There

[2. There ought to be a place *supposed in England*, and if there be not any such place in England, yet it is good, as of Jerusalem in England. Co. 10. 32. b.]

*3. A corporation *cannot be limited to a county*, as probos homines of such a county, or Trinity College in such a county, but it ought to be restrained to some certain place; Arg. 2 Brownl. 244. cites it as the opinion of the Lord Pop- ham in Button's Case.

Poph. 57.
Mich. 36
& 37 Eliz.
B. R. in
case of
BUTTON v.
WRIGHT-

MAN, Popham said, that to erect an hospital by the name of an hospital in the county of S. or in the Bishopric of B. &c. is not good, because he is bound to a place too large and uncertain; but a college erected in *Academia Cantabrig. or Oxon.* is good (and some are so founded), because it tends to a particular place, as a city, town &c.

(E) Of what Name.

[1. **T**HERE ought to be a name by which it ought to be in- corporated. Co. 10. 29. b.]

Jenk. 270.
pl. 88. in-
ought to
have a name
certain; -
but a *fidi-*

[2. The name of the corporation is as the name of baptism. Co. 10. 28. b. 123. 21 E. 4. 56. b.]

tions name will serve. — Le. 163. pl. 228. Mich. 30 & 31 Eliz. in Cam. Scacc. per Egerton Solicitor General, Arg. says it is a clear and plain rule in our law, that the name of a corpora- tion is as a name of baptism to a natural man, and if there be any difference, I conceive, that the law requires more strict certainty in the name of a corporation, than in the name of any particular person; for a name is more necessary to a corporation than to another; for when an infant is born, he is presently a perfect creature before any name given him, and the giving the name is not a matter of necessity, but of policy, for distinction &c. but in the case of a corporation, the name is the substance and essence of it, and it is not a body before a name be imposed upon it, and therefore in the charters of corporations there is always such a clause, *per tale nomen implacitare & implacitari, acquirere &c.* possint, and without their name they are but a trunk; but contrary in the case of particular persons. But otherwise in the case of a corporation, and we cannot give any thing to a corporation by circumstances inducing or implying their true name; as land given to the first hospital which the queen shall found, although that it sufficiently appear, that such a one was the hospital which the queen first founded, yet the gift is void. — Popham compares the name of a place of a corporation to the surname of a person, which regularly ought to be expressed in leases, but if it be not put with all exactness, yet it avoids not the lease; but however that be, it is certain the mistake of the very name of the place, which does not misname the situa- tion, is not material, for then it keeps within the general rule formerly given. Gibb. Hist. of C. B. 184. — Poph. 57. in Case of Button v. Wrightman, S. P.

[3. The king may incorporate a town by one name, and after by another name, (*) and then they shall use their name ac- cording to the second corporation, and yet they shall continue the possessions they had before by the other name. 21 E. 4. 59.]

* Fol. 513.

4. A corporation may be by one name, and enabled to purchase, and sue by another name; per Cur. Jo. 262. cites 11 E. 1. where a corporation was by the name of Master. Wardens, Brothers and Sisters of Rouncevil, and the patent said, that they should sue by the name of the Master and Wardens of Rouncevil.

A corpora-
tion by Tre-
by Ch. J.
and Powell
J: if by *pres-*
cription,
may have
several

names; but if by charter it is otherwise, for in such case it cannot have several names at the same time, and to the same purpose; for if a new charter is granted, and by a new name, the old one is gone; as in the case of baptism by one name, and confirmation by another, but such corpora- tion may have several names to several purposes, for it may be created *per Nomen D. to take and to grant, and per Nomen F. to sue and to be sued.* 3 Salk. 102. pl. 2. Mich. 10 W. 3. C. B. Anon. — Non sequitur that what will amount to a *descriptio persone* to enable to take, will be sufficient for a person to sue in; per Eyre and Powis J. 10 Mod. 208, in Case of Cambridge University v. Vavalor, Crofts, and A. Bp. of York,

5. Body politick *cannot be contained in this word (persons)* per opinionem, in the Reports of Plowden, fol. 177. Thel. Dig. 21. Lib. 1. cap. 22. §. 29.

10 Rep. 1.
 &c. S. C.

Ld. Raym.
 681. S. C.
 & S. P.
 Arg.

6. A corporation may be *named by a subject*. Jenk. 270. pl. 88. cites the Case of Sutton's Hospital. Mich. 10 Jac.

7. Where, my Lord Coke says, a corporation must have a name, it must be understood either as *expressed* in the patent, or *implied* in the nature of the thing; as if the king incorporate the inhabitants of Dale, and give them power to chuse a mayor, though there is no name of incorporation in the patent, yet it would be a good incorporation, and the name would be Mayor &c. Commonalty; per Holt Ch. J. 3 Salk. 102. Trin. 13 W. 3. B. R. in Case of College of Physicians v. Salmon.

8. *Inhabitants of S.* can neither take by purchase or devise. MS. Tab. December 1, 1722. Foley v. Attorney General.

Le. 163. in
 pl. 228.
 Arg. S. P.
 —New
 Abr. 501,
 S. P. in totidem
 verbis.

9. The names of corporations are *given of necessity*, for the name is as the *very being* of the constitution, and though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts, and it is no body to plead and be impleaded, to take and give, till it hath got a name, but natural persons can take before they come into being, and when they are in being, before they have got a name. As a remainder may be limited to the eldest son of J. S. but if a remainder be limited to such a corporation as the king shall next erect, this is not good, though a corporation be erected before the particular estate be determined, for this body of men are only capable of taking by the name in the patent: G. Hist. C. B. 181, 182, cap. 17.

And here
 they note,
 that if their
 names be
 expressed by
 words synonymous,
 it is sufficient;
 as if a college be
 instituted by the name
 of Guardianus, &
 Scholares Domus
 five Collegii
 Scholarum de
 Merton and they
 make a lease by
 the name
 of Custos &
 Scholares it is
 good. So if the
 grant be made
 by Præpositus &
 Socii where it
 should be
 Scholares, it is
 good.

10. These names of corporations are usually taken from 5 things, 1st. *From the persons, of which they consist.*

So if J. S. Abbot of B. makes a lease by the name of Clericus de B. it is well enough.

If there be a corporation founded by the name of Mayor & Burghenses Burgi Dom. Regis, an obligation is made to them by the name of Mayor & Burghenses de Linn Regis &c. without saying Burgi Dom. Regis, and this was allowed a good obligation; for the parties are sufficiently expressed, and all burroughs are founded by the king. Guardianus for guardian is well enough, but they are an aggregate body. Gilb. Hist. of C. B. 182, 183. — New Abr. 501. S. P. in totidem verbis.

If an house
 be founded
 by the name
 of Minister

11. 2dly, Their name is taken *from the end and design of their being.*

Pauperis Domus Dei, this is well enough, for the main design is specified by both names. But if an house be founded by the name of Guardiani & Scholarium Domus five Collegii Scholarum de Merton, and a lease be made by them by the name of Guardianus & Scholares Domus five Collegii de Merton, this is no good lease, for it is a material variance of the name, since they have not expressed the design of the house, which is a substantial part of the name. But if a college be instituted by the name of Aula Scholarium Reginae, to be governed by a provost, and they are confirmed by the king by the name of Præpositus & Scholares Aula Reginae, and they make a grant of that advowson by that name, this is good, for that college would never have a name according to the words of the first charter, for then it would be a sole corporation, which is contrary to the general convenience

venience of such a body, for the name would be *Præpositus Scholarium Aulae Reginae*, which cannot be intended, and the word *Scholares* is not required as in the former case, and the placing it where it is, confirms the establishment, and confirmation of the king, and common appellation are good interpreters of the original intent of the name. Gilb. Hist. of C. B. 183, 184. — New Abr. 502, 503. S. P. in totidem verbis.

12. 3dly, The names of corporations are taken *from the names of the patrons* that procured the jurisdiction, or that have endowed them,

E. 4. incorporated the Deans and Canons of Windsor by

the name of the *King's Free Chapel of St. George the Martyr*, and in the time of W. & M. they made a lease by the name of the *Dean and Canons of the King's and Queen's Free Chapel* &c. this is a material mistake of the name, for it takes its name from the founder, that is here mistaken, and the name of a different one substituted in its room. Gilb. Hist. of C. B. 184. — New Abr. 501, 503. S. P. in totidem verbis.

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13. 4thly, Their names are taken *from the places, where they reside,*

For the corporation has a fixed place where it is

settled, and from whence it cannot be removed, but to natural persons the name of the place is but an addition, for they may remove and change place, and so their names would have perpetual alterations. Gilb. Hist. of C. B. 184. — New Abr. 184. S. P. in totidem verbis.

14. 5thly, The * name of the *saint*; and if this be omitted or mistaken, this doth not avoid their grants or leases; for the name of dedication is but an empty sound, and expresses no real use or design, and therefore is immaterial, and may be omitted.

If the Prior of St. Michael of Coventry makes a lease by the name of Our

Dean of Coventry, this is good; so if they granted an annuity or corody, and the name of the saint had been omitted. Gilb. Hist. of C. B. 186. * See New Abr. 501.

(F) By what Words.

[1. THESE words, *Incorpora, Fundo, Erigo* &c. are not of necessity to be used in making a corporation, but words equivalent are sufficient. Co. 10. 30.]

Jenk. 270. pl. 88. S. P. — 10

Rep. 30. a. in the Case

of Sutton's Hospital, and says, that with this accords 44 Aff. 9. in the Prior of Plimpton's Case, and 4 E. 4. 7. in the Abbot of Glastonbury's Case, and that in none of those books or records was any mention made of those words, *fundo, erigo* &c. or any the like words; for, as has been said, they are words declaratory only, and the effect of them may be made by the owner of the land without any grant.

[2. Of ancient time the inhabitants of a town were incorporated when the king granted to them to have *guildam mercatoriam*. Reg. 219. Co. 10. 30.]

10 Rep. 30. a. in the Case of Sutton's Hospital,

cites the register 219. b. and says that thereupon the place of all their convocations and assemblies were called the Guildhall, and Ibid. 30. b. cites other books, that the words *Gilda Mercatoria* made an incorporation.

[3. The king gave licence to Ramsey to grant a rent *cuidam capellano*; this made a corporation. 2 H. 7. R. 155. * 2 H. 7. 13 Co. 10. 28. [27. b.]

* Br. Patents, pl. 44. cites S. C. —

Fitz. Grant, pl. 35. cites S. C.

[4. If

* Br. Corporations
pl. 65. cites
S. C.

+ Br. Patents, pl. 44.

cites S. C. — Fitz. Grant. pl. 36. cites S. C. — Br. Corporations, pl. 54. cites 7 E. 4. 14. S. P. — S. P. and it seems, that they are only tenants at will; and if the queen will release or give to them the said rent and fee-farm, it seems that the corporation is dissolved ipso facto; for the rent and fee-farm was the cause of enabling the corporation &c. Ideo quere. D. 100. a. pl. 70. Trin. 1 Mar. Anon.

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Br. Corporations, pl. 65, cites
S. C.

Br. Corporations, pl. 65. cites
S. C.

But if he gives the lands in fee-farm either probis

hominibus de J. or Burgenfibus, Civibus, & Communitati; this makes a good corporation. Br. Corporations, pl. 54. cites 7 E. 4. 14 — Theol. Dig. 20. Lib. 1. cap. 22. f. 17. cites S. C. and 21 E. 4. 56. that they are incorporated to have any action for any matter touching this land, but not otherwise.

[4. If the king grants lands to the men or inhabitants of D. *hæredibus & successoribus suis*, rendering a rent for any thing touching these lands, this is a corporation, but not to other purposes. * 21 Ed. 4. 56. 7 Ed. 4. 30. † 2 H. 7. 13.]

[5. But if the king grants land *hominibus*, or inhabitantibus de D. if they be not incorporated before, the grant is void, if no rent be reserved to the king. 21 E. 4. 56.]

[6. But if the king grants *hominibus de Islington to be discharged of toll*, this is a good corporation to this intent, but not to purchase. 21 E. 4. 59. (R. this is matter of discharge.)

[7. If the king gives lands to the inhabitants of Islington, and their successors, if they were not incorporated before, this is a void grant, for the king is deceived. 7 E. 4. 30.]

8. Ascue said, that the College of Rippon in his country was founded by the name of *Canonicj* only. Theol. Dig. 20. Lib. 1. cap. 22. f. 16. cites Trin. 18 H. 6. 16.

9. Corporation is good without limiting any number certain of persons to be of the corporation. Theol. Dig. 20. Lib. 1. cap. 22. f. 25. cites Hill. 34. H. 6. 27.

10. The king incorporated those of Norwich by name *De Civibus & Communitate*, and after in the charter *Concessimus Civibus prædictis quod non ponantur in Juratis &c. omitting this word Communitate*, and per Brian Ch. J. and Neale and Choke Justices, the grant is good to the citizens only, because it makes a new corporation. Br. Corporations, pl. 65. cites 21 E. 4. 55, 56.

11. And if the king grants to the inhabitants of the Vill of Dale, that they may chuse a mayor, and after this, that they shall implead, and shall be impleaded by the name of Mayor and Commonalty of Dale, now this word Inhabitants is gone, and yet it was good in principio to take the grant. Br. Corporations, pl. 65. cites 21 E. 4. 55, 56.

12. And note, that in all the ancient cities and boroughs of England, as in London and elsewhere, the grant is made to the citizens of London or burgeses of Dale, and the like, which were never incorporated before, and yet good; but it seems that those are favours for their long continuances, and there are many grants to them by names as above, and that they may make a manor, and to have consuance of pleas, and many other

other articles, is well, for they enjoy them. Br. Corporations, pl. 65. cites 21 E. 4. 55, 56.

13. If the king should *grant lands probis hominibus villæ de Iffington without saying habendum to them and their heirs, or successors, rendering rent*, this is a good corporation perpetual as that intent only, but then it seems that they are but tenants at will; and if the king releases, or gives to them the said rent, the corporation, it seems, is dissolved ipso facto; for the rent was the cause of the enabling the corporation, &c. Dyer 100. a. pl. 70. Trin. 1 Mar. says it was so held for law in the Star-Chamber. The book says, Ideo Quære.

14. King Edward 6. granted to the Mayor, Citizens, and Commonalty of London, *his Mansion-House, called Bridewell, and that it should be founded and erected into an hospital for the poor, and that when founded and erected, it should be called the Hospital of King Edward 6. of Christ, Bridewell, and St. Thomas the Apostle, and that they should be incorporated by the name of the Governors of the Possessions, the Revenues, and Goods of the Hospital of King Edward 6. &c.* Adjudged, that this Hospital in intention only was sufficient to support the name of a corporation, and that the words, (viz.) the Governors from henceforth should be incorporated by the name &c. incorporated them immediately, and that they should not wait till an hospital be actually built. 10 Rep. 31. a. b. cites Mich. 34 & 35 Eliz. Rot. 172. B. R. Bridewell Hospital's Case.

15. King J. by his letters-patent granted that the Borough of Yarmouth should be incorporated, and the grant is made *burgensibus, without naming of their successors*, and also he granted *burgensibus tenere placita coram ballivis*, and in pleading it was *not averred that there were bailiffs there*, and it was objected that the borough cannot be incorporated, but by men which inhabit in it; but it was resolved, that the grant is good, and the Lord Coke said, that he had seen many old grants *to the citizens of such a town*, and good, and so that the grant *burgensibus*, that the borough should be incorporated, being an old grant, *should have favourable construction*; but the doubt was, for that, that it was not averred that there were bailiffs of Yarmouth, and if a grant to hold pleas, and doth not say before whom, the grant is void, according to 44 E. 3. 2 H. 7. 21 Ed. 4. And for that it was adjudged; but the opinion of all the Court was, that the grant made *burgensibus* was good without naming of their successors, as in the Case of Grant Civibus, without more. 2 Brownl. 292. Hill. 7 Jac. 1609. C. B. Yarmouth Borough's Case.

16. A charter by the king to *aliens* may make them a corporation as to the king, but not a corporation as to the subjects. See Roll. Rep. 148. Hill. 12 Jac. B. R. in the Case of the King v. Hanger.

17. The *locksmiths of Durham* made orders for taking away locks ill made, supposing themselves to be a corporation, because the Bishop of Durham having *jura regalia* had confirmed their orders; but Roll Ch. J. thought it would be hard to maintain

maintain that this made them a corporation. Sty. 298. Mich. 1651. Goodyer v. Shaw.

(G) *What Thing shall be incident to a Corporation without special Grant or Prescription.*

[1. **W**HEN a corporation is duly created, *all other incidents are tacitly annexed.* Co. 10. 30. b. P. 11 Ja. B. R. *St. Savior's Case* resolved.]

10 Rep. 30.
b. S. P. per
Cur. cites
22 E. 4 Tit.
Grants 30.
where it is
held by
Brian Ch. J.
and Choke
accordingly,

[2. *As if the king makes a general corporation by a certain name without any words of licence to purchase lands, or implead, or be impleaded, yet the corporation may purchase, plead, or be impleaded well enough; for that by the making of the corporation all those necessary incidents are included.* P. 11 Jac. Scaccario, *St. Savior's Case*, resolved per Curiam. Co. 10. 30. b. Hobart's Reports 285.]

and where in that case it was said 1st. By the same to have authority, ability, and capacity to purchase, but adds not any clause to enable them to alien &c. yet that is incident, and need not be added. 2dly, To sue and to be sued, implead and be impleaded. 3dly, To have a seal &c. This is also declaratory, and not necessary; for when they are incorporated they make or use what seal they please. 4thly, It restrains them from aliening or demising, unless in a certain form; this is an ordinance, testifying the desire of the king, but is only a precept, and does not bind in law. 5thly, That the survivors shall be the corporation; this is a good clause to remove doubts and questions which may arise, the number being certain. 10 Rep. 30. b. in the case of Sutton's Hospital.

Hob. 211. pl. 268. in *Case of Norris v. Staps*, Hobart Ch. J. says, that though power to make by-laws is given by special clause in all corporations, yet it is needless; for I hold it to be included by law, in the very act of incorporating, as is also the power to sue, purchase, and the like; for as reason is given to the natural body for the governing of it, so the body corporate must have laws as a politick reason to govern it, but those laws must ever be subject [266] to the general law of the realm, as subordinate to it; and if the king in his letters patents of incorporation do make ordinances himself, yet they are also subject to the same rule of law. — 5 Mod. 439. S. C. cited by Holt Ch. J.

Lane 21.
Pasch. 4
Jac. in
Scacc. S. C.
and S. P.
but Tanfield
Ch. B. said,
that he held
that this

[3. *But by special words the king may make a limited corporation, or a corporation for a special purpose; as if the king grants probis hominibus de Islington, & successoribus suis, rendering a rent, this is a corporation to render the rent to the king, and not otherwise.* P. 11 Jac. Scaccario, *St. Savior's Case*, per Curiam resolved.]

lease should not make a corporation where the king conceived that there was no corporation before, but that the king should rather be said to be deceived; for he took a difference where there is a reputed corporation in being and where there is not, and thereupon in the principal case the barons directed the jury to give a general verdict.

They may
make ordi-
nances
agreeable
to the law.
Jenk. 270.
pl. 88. —
See the
notes at
pl. 3. Supra.

[4. If the king *creates a corporation, and does not give any express power* in the letters patents *to make laws*, yet this power is incident to the corporation, and included in their incorporation; but these laws ought always to be subject to the laws of the realm, as subordinate thereto; for a body politick cannot be governed without laws. Hobart's Reports 285.]

[5. If the king creates a corporation of a mayor, and 8 aldermen, with a clause in the patent, *Quod super mortem vel remotionem alicujus aldermanni liceat majori, & cæteris aldermannis infra octo dies proximo post mortem vel remotionem &c. to elect another alderman into his place &c.* though no election be within 8 days after the death of (*) an alderman, yet *they may elect an alderman at any time after*; for they have power to elect another, as incident to the corporation created; for ancient corporations have no such clause, giving power to elect, and this affirmative power does not take away the implicative power incident to the corporation. P. 8 Car. B. R. in the Case between *Hicks* and the town of *Lanceston* in *Cornwall*, resolved per Curiam, scilicet, *Richardson* and *Croke*, no other of the Judges being there, and a writ granted accordingly to elect another alderman.]

S. C. cited
Arg. Show.
Parl. Cases
45.—S. C.
cited 8 Mod:
127. Arg.

* Fol. 514.

[6. [So] If a corporation be created of a mayor and 8 aldermen, with a clause in the patent, that if any of the aldermen die, or be removed, and it shall be lawful for the mayor and the rest of the aldermen, within 8 days after the death or removal, to elect another in his place, *though it is not limited, that they, or the greater number of them, may elect*, yet the greater number may elect. P. 8 Car. B. R. between *Hicks* and the Borough of *Lanceston*, admitted per Curiam.]

[7. And in the said case, *if the mayor, at the time of the death of an alderman, be absent from London till after the 8 days, and the aldermen, within the 8 days, come to the deputy, and require him to make an assembly of them to elect another within the 8 days, and he refuses, and thereupon the greater part of the aldermen assemble themselves without the mayor or his deputy, and elect an alderman*, this is a void election, for the mayor ought to be present at it by the words of the grant. P. 8 Car. B. R. between *Hicks* and the Borough of *Lanceston*, per Curiam.]

8. When a corporation is made, eo ipso without any words, they are enabled to *have a common seal; and to implead and be impleaded, to make leases and grants, to purchase for years, lives, or in fee; but for purchases in fee they ought to have a dispensation of the Statute of Mortmain from the king, and the lords mediate, if the land be holden from them. They have power to make ordinances according to the law.* Jenk. 270. pl. 88.

A corporation which has a fee-simple in [267] lands, cannot be restrained from making a lease for 21 years or

more, or 3 lives, or in fee, unless by act of parliament; for it is against the nature of an estate of fee-simple to be restrained. Jenk. 270. pl. 88.

9. If there be a popular election of mayor, and mayor and aldermen in corporation towns, and this happens to breed a confusion amongst them, this may be altered by their agreement, and by the common consent of all, to have their elections made by a fewer number, but not otherwise; but if by their charter they are to be elected by them all, then this is not

not *altered* but by, and with, the general assent of the whole town, and so by this means to take away confusion; per tot. Cur. 3 Bulst. 71 Trin. 3 Jac. The Corporation of Colchester v. &c.

10. Every corporation, as such, have power to take a burgess's *resignation*; per Hale Ch. B. Sid. 14. pl. 4. Mich. 12 Car. 2. B. R. The King v. Tedderley.

Vent. 355.
S. C. and
S. P. per
Cur.

11. A new charter doth not merge or *extinguish* any ancient *privileges*, but the corporation may use them as before. Raym. 439. Pasch. 33 Car. 2. B. R. Haddock's Case.

12. Whether a *power of disfranchisement* be a power incident to every corporation? or whether it must be given by express words in the charter? See Arg. 10 Mod. 175. Trin. 12 Ann. B. R. in Case of the Queen v. Corporation of Buckingham,

(G. 2) What a Corporation may do, and what must be under the Corporation Seal.

1. IF the mayor and commonalty be *disseised*, and after every one of the commonalty release by their proper names, this is not good, but the mayor and commonalty ought to release by their common seal. Br. Corporations, pl. 27. cites 19 H. 6. 64.

2. In feoffment to the dean and chapter they cannot take but by letters of attorney under seal; per Brook Justice. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

3. Abbot and convent cannot lease but by deed, but the abbot alone may lease without deed, and if the predecessor receives the rent, the lease is affirmed good. Br. Leases, pl. 32. cites 5 E. 4. 43. and says it is so said there.

4. Bond made by the mayor and commonalty to the mayor is not good, for he is the head of the corporation. Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

5. So it is *in quare impedit*, the master and confreres cannot present the master, contra of one of the confreres. Br. Corporation, pl. 63. cites 14 H. 8. 2.

In a *quo warranto* against the Mayor and Citizens of

Chester, there was a *warrant of attorney* under the seal of the mayor to appear; quare, whether it should not have been under the corporation seal. Skin. 154. The King and the City of Chester.

6. *Warrant of attorney* of a corporation shall be by their common seal, and otherwise it is void; per Choke Justice. Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

[268] 7. If a corporation have a power to *remove a man* &c. at their will and pleasure this must be under the common seal; but a return to a mandamus debito modo amotus may suffice. Vent. 355. Trin. 33 Car. 2. B. R. in Haddock's Case.

8. A *mandamus* being directed to the Mayor and Burgesses of Abington, to restore Mr. Holt to the Recorder's place, they returned

returned that the king by his letters patent gave them liberty to make a recorder *durante bene-placito*; it was said by Mr. Wylde, that a corporation cannot determine their will but under their corporation seal. Freem. Rep. 428. pl. 575. Trin. 1676. Holt v. Medlicot.

9. A corporation cannot do an act in pais without their common seal, yet they may do an act upon record; so the city of London every year makes an attorney in B. R. without either sealing or signing, and they are estopped by their act to say it is not their act. The mayor's hand is not necessary to a return, for he is liable in an action for a false return without it in his private capacity; it is sufficient evidence that the writ was delivered to him, and that there is a return made, and then the mayor must shew the contrary; and the mayor, or any other magistrate, that procures the false return, though without the common seal, or the mayor's hand to it, is liable not only in their corporate, but their private capacity; per tot. Cur. 1 Salk. 192. pl. 4. Hill. 1 Ann. B. R. in Thetford (Mayor's) Case.

3. Salk. 103.
pl. 4. S. C.
in totidem
verbis.

(G. 3) Acts done by them good or not, being not done by the whole Body.

1. 33 H. 8. *ALL and every particular act, order, rule, and statute, made by the founders of any hospital, college, deanry, or other corporation, whereby the grant, lease, gift, or election of the governor or ruler of such corporation, with the assent of the major part of those as shall have a voice, or assent to the same, shall be in any wise hindered or let by one or more, being the lesser number of such corporation, contrary to the common law of this realm, shall be void, and of no effect.*

2. *And all oaths taken by any person of such corporation for the observance of any such order or statute, shall be void; and no member of any such corporation shall be compelled to take an oath for the observing such statute on pain that every person giving such oaths shall forfeit 5l. to be divided between the king and the prosecutor to be recovered in any of the king's courts of record.*

3. Corporation of Mayor, or Bailiffs, and Burgeesses of Windsor, may make lease for years. One bailiff only assents; the lease was void, and so it would had two only assented; and it was agreed, that if the greater part of burgeesses assent it is good; and it is not necessary that all be present at the sealing, if their assents be had before. D. 282. b. Marg. pl. 26. cites Good's Case.

Poph. 211,
212. S. C.
but not S. P.

4. The Mayor and Commonalty of Southampton have an assignment from the king of a sum of money to be paid yearly to them and their successors out of the customs of this town and port; the mayor alone makes an acquittance upon receiving it; this does not bind the corporation in strictness of law, but because 100

The mayor and commonalty are one indivisible body, the mayor, as mayor,

can do nothing regularly, for he is the

precedents were shown which allowed it, *it was allowed by all* the Judges of England. Jenk. 162. pl. 9.

head of the corporation aggregate, and is only a part of it; but usage and precedents are not to be neglected in things indifferent, or which are not mala in se. Jenk. 163. pl. 9.

5. The king did grant that the parishioners of Wallingford should be a corporation to bargain and sell, and that the greater number of the parishioners there did make leases and estates, and there was an *usage, that at the time of meeting for the making of any such leases by them, they did use to ring a bell, by the which notice was intended to be given of the assembly,* and that after such bell rung 20 of the parishioners then present did make a lease, there being 100 others in the parish not present, and yet this was adjudged in the court 32 Eliz. to be a good lease, and he said, that if there be a *day and place by usage certain for their meeting,* in such case there needeth no warning. Lane 21. Pasch. 4 Jac. in the Exchequer cited by Tanfield Ch. B. in Case of St. Saviour's Parish.

6. Where an act is to be done by a corporation, all the members *ought to be assembled together* to consent, but this cannot be separately and apart by them at several times, for then it is *factum singulorum*. Dav. 48. a. Pasch. 5 Jac. B. R. in the Case of the Dean and Chapter of Fernes.

7. In a trial at Bar for the parsonage of H. in the county of O. the church being in the presentation of the Dean and Canons of W. where there are 12 canons besides the dean, which in all make up 13 of the corporation, it was held, 1st. That *prima facie, in all acts done by a corporation, the major number must bind the lesser,* or else differences could never be determined. 2dly, That acts done by the corporation *ought to be done by the consent of the major number,* or else they are not valid, and therefore *where the corporation consists of 13, there ought to be 7 to make a chapter;* but the *act of the major number of these 7 is binding to the corporation.* But if the *ancient usage hath been, that acts have been done from time to time by the major number of those that are present, although they are but 3 or 4,* it shall be then intended that that was part of their constitution at the beginning, and so *what is done by them shall be binding to the rest;* and if it were otherwise, it would avoid multitude of leases; for it is the common practice in most places, to seal leases by the major number of the dean and prebendaries that are resident at the time when the lease was made. Freem. Rep. 504. Pasch. 1693. Haschard v. Somany.

8. If an act to be done be *referred to the constituent members of a corporation,* nothing can be done but by the majority of those who are the constituent part of the corporation; but where a thing is referred to be done by the *commonalty,* there the majority of those, who are present (all being summoned) will determine and bind the rest, but in the other case the majority of those who are present will not do; per Cur. Mich. 6 Ann. B. R. The Queen v. Lock.

9. A corporation aggregate consisting of 2 bailiffs and bur-
gessees &c. and one of the bailiffs and burgessees made a lease in
their politick capacity to the other bailiff in his natural capacity.
The Court was of opinion, that the bailiffs made but one
officer, and the one cannot act without the other; therefore
if a lease is made by the corporation to one of them, he is both lessor
and lessee, which cannot be. 8 Mod. 303. Trin. 10 Geo. 1725.
Salter v. Grofvenor.

10. A sole corporation, as a bishop or a parson, could not
make a lease to himself, because he cannot be lessor and lessee,
and the law is the same in a corporation aggregate, as dean
and chapter, for a lease cannot be made by the chapter without [270]
the concurrence of the dean; and for the same reason a lease
cannot be made to the dean without the concurrence of the
chapter, but it may be made to any of the prebendaries, because it
is not necessary that any of them should join in the lease, for a
prebendary is not an integral part of the body corporate.
8 Mod. 304. Trin. 10 Geo. 1725. in Case of Salter v. Grof-
venor.

11. Where-ever notice is given of the meeting of a corpora-
tion for one particular business only, the body cannot go on to
other business unless the whole body is met, and it is done by con-
sent. Bernard Rep. in B. R. 80. Mich. 2 Geo. 2. says this
was laid down as a rule by the Ch. Justice in the Case of the
King v. Wakes.

12. A charter required, that the presence of the mayor be
necessary at all corporate assemblies. The corporation were
assembled, and a matter being proposed, the mayor dissolved
the assembly, but the remaining part of the corporation continued
together, and proceeded. It was objected, that such after-pro-
ceedings were irregular; but the Court said, it was very true,
that no new business can be proposed in the absence of such
officer, but that the assembly has always a right to proceed in the
business which was begun when he was present. Barnard, Rep.
in B. R. 385, 386. Mich. 4 Geo. 2. The King v. Norris.

(G. 4) Grants to or by Corporations, and by
what Names or Titles they may take, or grant,
and where there is a Variance or Misnomer.

1. WHERE a feoffment is made to a corporation and a single
person, it ought to be by deed, and that the livery be
made to the attorney of the corporation, authorised by deed,
and to the other person also, and then they shall be tenants
in common, otherwise the corporation can take nothing; per
Huffey. Thel. Dig. 27. Lib. 2. cap. 3. f. 10. cites Hill.
7 H. 7. 9.

2. If I devise land to the Abbot of St. Peter, where the s. C. cited
foundation is St. Paul, the devise is void; per Englefield J. by Hobart
Quod Ch. J. Hob.

33.—Gibb. *Quod non negatur.* Br. Devise, pl. 2. cites 19 H. 8. 8.
 Hist. of [b. pl. 1.]
 C. B. 186.
 cites S. C.
 for here the saint's name is the only specification of the party in the devise, which is mistaken.

4 Le. 223. 3. If a *master* or president of a college by his testament *de-*
 pl. 357. the *vies land to the said house* whereof he is president, and dies,
 President the devise is void, because they have no head. Dal. 31. pl.
 of Corpus 13. Anno 3 Eliz. and cites 13 H. 8. 13. S. P.
 Christi Col-
 lege's Case,
 S. C. and S. P. per Cur. and the serjeants and others.

Without 4. If a grant is made *to or by a corporation in time of vaca-*
 their head *tion*, it is void. Litt. f. 443.
 they cannot
 take to the
 use of the house; for without a head the body is imperfect. Dal. 31. pl. 13. Anno 3 Eliz.

If during the vacation of the Abathy of Dale a lease for life, or a gift in tail be made, the remainder to the Abbot of Dale and his successors, this remainder is good, if there be an abbot made during the particular estate. Co. Litt. 264. a.

[271] If there be *Mayor and Commonalty of D.* and the mayor dies, a grant made to the *Mayor and Commonalty of D.* is void; but in that case, if a lease for life be made, the remainder to the *Mayor and Commonalty of D.* the remainder is good, if there be a mayor elected during the particular estate. Co. Litt. 264. a.

5. The Dean and Canons of Windfor were incorporated by act of parliament by the *Dean and Canons of the King's Free-Chapel of his Castle of Windfor*, and they made a lease by the name of the *Dean and Canons of the King's Majesty Free-Chapel of the Castle of Windfor, in the County of Berks.* All the Justices held the lease good enough; for though the king in parliament ought to call it His Castle, yet when another speaks of it he is more apt to call it The Castle, and consequently such variance is not material. Mo. 71. pl. 195. Trin. 6 Eliz. The Dean &c. of Windfor's Case.

6. And though more be put into the words of the lease than are in the words of incorporation, yet it is not prejudicial if every word is true; as if he had added of the Castle of New Windfor, or the Chapel of St. George the Martyr, because it is true, and there is not any other Windfor known, or any other St. George than the Martyr, and though it might otherwise, yet it shall not be intended. Mo. 72. in pl. 195. Trin. 6 Eliz. in the Dean &c. of Windfor's Case.

7. The Cooks of London were incorporated by Ed. 4. and that two principals of the community, by the assent of 12, or at the least of 8 persons of the said community, in *mysteria prædicta maxime expertes singulis annis eligere possint et facere de communitate illa duos magistros sive gubernatores ad supervidend &c. et quod iidem magistri vel gubernatores et communitas, should have perpetual succession, and a common seal &c. and that they might purchase and enjoy lands &c. in fee &c. A deed of bargain and sale is made by A. B. C. and D. Master and Wardens of the Craft and Mystery, and the Commonalty of the same Craft and Mystery, and J. L. of the one part, and R. Dormer of the other part. Held here, that the corporation was misnamed, for here are 4 particular*

singular persons named, and Master is added at the end in the singular number, and therefore it cannot refer to them all, or to two of them, and if it refers to the four the charter doth not warrant this, for that is a greater number than the charter wills, and if it shall refer to the last name, then there are not masters, and the plural number is material, and in the indenture they are called Master and Wardens, and Warden is not in the charter, nor can be part of the corporation, and if in the place of Wardens, Governors had been put, they ought to have put (or) in the place of (et) as Masters or Governors, but as for the words (Craft and Mystery) which are put in the indenture before the words (and commonalty) it is but surplusage, which will not make the deed of bargain and sale void. Plow. Com. 537. Trin. 20 Eliz. Croft v. Howell.

8. A corporation was made by the name of the *Dean and Chapter Ecclesiæ Cathed. Sanctæ & individue Trin. Caerlil.* made a lease by the name of *Decanus Ecclesiæ Cathed. Sanctæ Trin. in Caerlil. & totum Capitulum de Ecclesiâ prædictâ.* Six were against three, that it is good notwithstanding the variance, which is not in substance of the name. D. 278. pl. 1. Mich. 21 Eliz. Carlisle Dean and Chapter's Case. Gouldsb. 122. S. C. cited by Gawdy as held so by the better opinion 11 Eliz.

9. There is no book of law which avoids leases or grants of corporations for variance in any of these four circumstances, viz. *Addition, Interposition, Omission, or Commutation*, if they retain the four first principles of substance, viz. *Name of Persons, of House, Foundations, or Dedication, Place known before the foundation in which the house is situate; per Manwood Ch. B. Mo. 235. pl. 367. Hill. 29 Eliz. in Fanshaw's Case.* There must be no omission of any material part. And. 23. pl. 47. Pasch. 3 & 4 Ph. & M. Dean and Chapter of

Eaton's Case. — D. 150. a. pl. 84. Trin. 3 & 4 Ph. & M. S. C. they were incorporated by the name of *Præpositi & Collegii Regalis Collegii beati Mariæ de Eaton juxta Windfor*, and made a lease by name of *Præpositi, & Sociorum Collegii Regalis de Eaton* [272] &c. omitting *Collegium beati Mariæ*; and all the justices held this a void lease. D. 150. a. pl. 84. Trin. 3 & 4 Ph. & M. and says, that it was so adjudged Mich. 10 Eliz. & Mich. 18. where the place of the corporation, viz. Chester, was omitted in the grant of the dotation made to the dean and chapter, but in the habend. it was inserted. — Mo. 13. pl. 52. S. C. that the words (*Sanctæ Mariæ*) were omitted, and therefore held void; but the lease by the Dean and Chapter of the cathedral church *Peterburgenfis* where they were incorporated by the name *Sancti Petri Burgenfis* was not void, cites a great many year books.

10. The *Provost, Fellows, and Scholars of Queen's College Oxon.* are guardians of an hospital in Southampton, and they leased parcel of the said hospital by the name of *Provost, Fellows, and Scholars, Guardianus of the Hospital*; it was objected, that it should be *Guardiani*, because the College consist of many persons, and every one is capable, and not like to Abbot and Convent; but the whole Court held, that the College is as one body, and as one person, and so the lease and declaration were both good. Le. 134. pl. 183. Hill. 30 Eliz. Queen's College Oxon's Case.

11. If the queen will found an hospital by the name *Quod fundavimus ad rogationem Christopheri Hatton Cancellarii Angliæ*, all the same ought to be expressed in every grant made by,

or to the said hospital; per Egerton Solicitor General Arg. Le. 164. Mich. 30 & 31 Eliz. in Scacc, in Case of Marriot v. Pasfall.

12. So quod fundavimus *ad relevandum pauperes*. Ibid.

13. And sometimes the number of persons incorporated, if it be in the charter, it ought to be used in all acts made by or to them; as *Master and 6 Chaplains*; per Egerton Solicitor General Arg. Le. 164. Mich. 30 & 31 Eliz. in Scacc, in Case of Marriot v. Pasfall.

a Le. 97.
pl. 119.
S. C. held
according-
ly.

14. The Dean and Chapter of Exeter made a lease by the name of the *Dean and Chapter of St. Mary of Exeter*, whereas they were incorporated by the name of the Dean and Chapter of St. Mary in Exeter; but this was held to be no material variance. Cro. E. 167. pl. 3. Hill. 32 Eliz. B. R. Willis v. Jermin.

Sav. 228.
pl. 198.
S. C. ad-
judged.

15. In ejectment of a lease by the *Warden and College of All-Souls of Oxford*, the jury found the lease to be made by the *Warden and College of All-Souls of Oxford in the County of Oxford*. It was objected that this could not be the lease on which the plaintiff had declared, because it varied from that lease, the one being made by the Warden &c. of All-Souls of Oxford, and the other by the Warden of All-Souls of Oxford in the county of Oxford. But per Cur. the plaintiff had given judgment, for the verdict having set forth, that the Warden &c. was seised, and being so seised, made the lease &c. and sealed it with their common seal, all this is the same as in the declaration, and the words, (viz,) (in the county of Oxford) are not added as part of the name of the corporation, but only to shew in what county Oxford is. 1 And. 248. pl. 261. Pasch. 32 Eliz. Carter v. Cromwell.

There is a
diversity
between an-
cient corpo-
rations and
corpora-
tions made
of late

16. It was held per Curiam upon evidence, that a corporation may be known by two names, and if it hath been so known time out of mind, that a grant made by either of the names is good. Cro. E. 351. pl. 4. Mich. 36 & 37 Eliz. B. R. Vaughan v. Gainsford.

time; for ancient corporations may by usage have divers several names; and demises, grants &c. by any of them are good enough. 10 Rep. 126. Mich. 11 Jac. C. B. Cites abundance of cases. S. P. by Hale Ch. B. as by the name of Burgeses, and of Ballivi and Burgeses; but if the name of Ballivi and Burgeses be a name which they have recorded within time of memory, they cannot prescribe by it, but by their ancient name, till such a time, and then &c. as in Dyer. Hard. 604. Pasch. 21 Car. 2. in Scacc. in Case of Attorney General v. Farnham (town in Surry). Gilb. Hist. of C. B. 186, 187. S. P.

[273] 17. A bargain and sale by the king for any consideration, to a corporation is good, although the king cannot stand seised to the use of another; and the consideration of money paid or mentioned to be paid, although by any stranger, makes the conveyance of bargain and sale valid. Jenk. 270. pl. 88.

18. King H. 8. incorporated Trinity College in Cambridge by the name of *Master, Fellows, and Scholars of the College of the Holy and Undivided Trinity in the University of Cambridge* and anno 6 E. 6. they made a lease by the name of the *Master, Fellows*

Fellows &c. of Trinity College but left out the word (*University*.) Two Justices thought the lease good, but the two others, and the Ch. J. thought it void, but he moved the parties a second time to an agreement, and would not as yet give judgment. 2 Brownl. 243. Pasch. 7 Jac. B. R. Trinity College's Case.

19. A devise of an house was to his wife for life, remainder to the Master and Wardens of the Queen's Free-School of St. Olave's Southwark; in ejectment brought by the said Master and Wardens, it was objected; that the corporation could not take by this devise, because there is an exception in the Stat. 32 H. 8. cap. 5. of Wills of all Bodies Politick or Corporate, so that they are excepted from taking by the will; the Court were all clear of opinion, that the plaintiff had a good title. 2 Bulst. 33, 34 Mich. 10 Jac. Master &c. of St. Olave's Case.

20. The Dean and Chapter of Norwich were incorporated by H. 8. by the name of the Dean and Chapter of the Bishop of Norwich and his Successor; they surrendered their charter to Ed. 6. and afterwards were incorporated by him by the name of the Dean and Chapter Sanctæ individuae Trinitatis Norwici ex Fundatione Regis Ed. 6. They made a lease by the old name of incorporation, leaving out (Ex Fundatione Regis Ed. 6.) and adjudged that the lease was good. Palm. 491. Hill. 3 Car. B. R. Heyward v. Fulcher.

Jo. 166. S. C. the court held the lease good, inasmuch as the first corporation was not extinct, and the lease made by the ancient

name was good notwithstanding the said omission in the grant and lease.

21. Debt upon a bond made to the plaintiff's wife dum sola by the Corporation of Wells, by the name of the Mayor, Aldermen, and Burgeses. Upon non est factum pleaded, the jury find a special verdict, that Queen Eliz. in the 31st year of her reign, created them a corporation by the name of the Mayor, Masters, and Burgeses of Wells, and that Car. 2. in the 35th year of his reign, by his letters patents, granted to them that they should be known by the name of the Mayor, Aldermen, and Burgeses &c. and by this last name they entered into the bond; and if this be the bond of the Mayor, Masters, and Burgeses of Wells, then &c. And adjudged for the defendants, because by the taking of the second letters patents the first name is entirely extinguished; but it was agreed, that a corporation might have two names, the one by prescription, and the other by grant, or both by prescription, but not two by grant. Lord Raym. Rep. 80, 81. Pasch. 8 W. 3. Knight & Ux. v. the Mayor, Masters, and Burgeses of Wells.

22. The names of corporations are not arbitrary sounds merely so individuate, but have a certain and significant meaning, and if that be kept to, though the words and syllables be varied, yet the body politick is very well named, for then there is enough said to shew that there is such an artificial being, and to distinguish it from others. Gilb. Hist. of C. B. 181.

New Abr. 592. S. P. in totidem verbis.

10 Rep.
57. b. Trin.
11 Jac. in
the Chan-
cellor of
[274]
Oxford's
Case S. P.

23. Any corporation by act of parliament may, take by another name than that by which it was instituted, for in acts of parliament the subject and design of the legislature must be respected, and those that have power wholly to change the name of things, have certainly power to alter it in any act of theirs, and all inferior jurisdictions are bound to support the sense of the law, and not to destroy it, if it has any meaning, and therefore the statute that Advowsons of Popish Recusants convicted be given to the Chancellor and Scholars of the University of Oxford, and they bring their action by the name of the Chancellor, Master, and Scholars of the University of Oxford, this is well enough. Gilb. Hist. of C. B. 187.

24. If a writ be brought by Hugh Prior of Coventry, this is too general, and shall abate, but in a lease so made had been good. Gilb. Hist. of C. B. 189.

New Abr.
508. S. P.
in totidem
verbis. —
6 Rep. 65.
a. Mich.
4 Jac. C. B.
in Sir Moyle
Finch's
Case, S. P.
—10 Rep.
225. b. 126.
a. S. C. &
S. P. cited
by Coke Ch. J. Mich. 11 Jac. in the Mayor and Burgesses of Lynn's Case.

25. There is a difference between writs, declarations &c. and obligations and leases; for that if the name of a corporation be mistaken in a writ, a new writ may be purchased of common right; but it were fatal, if mistaken in leases and obligations, and the benefits of them would be wholly lost; and therefore one ought to be supported, and not the other. J. Abbot of W. granted common of pasture to J. S. by the name of W. Abbot of W. this is good enough *causa qua supra*; but if this name had been thus mistaken in a writ, it had been fatal. Gilb. Hist. of C. B. 189.

(G. 5) Grants by a Corporation. Good or not. In what Cases,

1. **THE** queen makes a lease for years of land to the Men of Chesterfield, rendering rent, and the grant was to them by the name of the Aldermen of Chesterfield, and they by the name of Aldermen of Chesterfield grant their interest to C. in the said land; and it was agreed by the Court that the grant by them was void; for they by the grant of the queen have capacity to take, but not to grant the land to another. Cro. E. 35. pl. 3. Mich. 26 & 27 Eliz. B. R. The Aldermen of Chesterfield's Case.

2. A corporation of mayor and commonalty, or of bailiffs, burghesses &c. may by their common seal grant their lands &c. for life or years, or *in fee*, and this shall be good, and bind their successors; per tot. Cur. Sid. 162. pl. 15. Mich. 15 Car. 2. B. R. Smith v. Barret.

3. No person, natural or politick, who has a fee, but may alien it; a bishop, dean, and chapter &c. are corporations, which have their estates under a trust, yet they may alien; per Holt. Skin. 602. Mich. 7 W. 3. B. R. in the Banker's Case.

4. And

4. And though a *parson* may not alien by himself, yet he may by the consent of the *patron* and *ordinary*; per Holt. Skin. 602. Mich. 7 W. 3. B. R. in the Banker's Case.

(G. 6) Grants to a Corporation. To what Persons it shall be said to extend; and what Passes. [275]

1. COVENANT was brought by the Mayor and Commonalty of N. against the Mayor and Commonalty of D. and counted that the defendants by their deed had covenanted that the plaintiffs should be quit of *murage*, *pontage*, *custom*, and *toll* in D. of all those of N. and that they had taken toll by certain of their *Burgesses*, of certain of their *Burgesses* of N. wrongfully &c. And there adjudged that the taking of the common servant is the taking of the corporation, and so the covenant broken; quod nota; and it is not mentioned there if the servant was servant by specialty under the common seal of the corporation, or not. Br. Corporations, pl. 14. cites 48 E. 3. 17.

Br. Corporations, pl. 15. cites S. C. — Contra if it be made by another particular person. Br. Corporation pl. 74. cites S. C.

2. It was said by *Pafton*, that if goods are given to an *abbot*, and to another, the property is jointly in them two, and nothing in the house &c. and that the other shall have all by *survivorship* if the *abbot* dies. Thel. Dig. 26. Lib. 2. cap. 2. f. 24. cites Trin. 9 H. 6. 25. and that so it is agreed in a lease for years made to them. Trin. 16. H. 7. 15.

3. Obligation made to J. P. Alderman of Saint Mary's Guild of D. and his successors, and in fact there is no such corporation there, the obligation shall go to the executors, and successors is void. Br. Obligation, pl. 68. cites 20 E. 4. 2.

4. So of bonds made to the church-wardens in London, and their successors, it is void to the successors, and good to the executors; for they are not incorporated. Br. Obligation, pl. 68. cites 20 E. 4. 2.

5. And where bond is made to the Dean of P. and his successors, and it is not said dean and chapter, and his successors, this is good to the executors, and void to the successors. Br. Obligation, pl. 68. cites 20 E. 4. 2.

6. Contra if it had been to the dean and chapter and his successors; viz. to him and his heirs, and another with the corporation. Br. Obligation, pl. 68. cites 20 E. 4. 2.

7. And if obligation be made to the bishop of L. and his successors, or Parson of D. and his successors, this goes to the executors, and yet they are a corporation; for they have two capacities. Br. Obligation, pl. 68. cites 20 E. 4. 2.

8. Contra of abbot or prior. Br. Obligation, pl. 68. cites 20 E. 4. 2.

9. If land be granted to a mayor and commonalty without saying to their successors, they have fee-simple. Thel. Dig. 20. Lib. 1. cap. 22. cites 11 H. 7. 12.

10. It was said, that if land be given *Jo. Stile Dean &c. and to his successors, and to Jo. Stile Clerk, being the same person, and to his heirs*, that this is a good gift, and that *he shall be tenant in common with himself* for diverse respects. Thel. Dig. 27. Lib. 2. cap. 3. f. 11. cites Trin. 13 H. 8. 14.

[276] 11. If one *devises land to A. N. Dean of Paul's and to the chapter there, and their successors, and A. N. dies, and a new dean is made, and then the devisor dies*, the land shall vest in the new dean and chapter according to the *intent*, though by the words it does not; for the chief intent was to convey it to the dean and chapter, and their successors for ever, and the singular person of A. N. was not the principal cause, though perchance it was one of the causes; per Manwood, Pl. Com. 344. b. Trin. 10 Eliz.

(G. 7) Actions. Obligations &c. made to or by Corporations. Liable; who, where the Head is removed. And Pleadings.

Br. Non est
Factum, pl.
3. cites S. C.

NOTE; that the *deed of an abbot and convent*, which abbot is deposed or deraigned after, is good. B. Abbe, pl. 19. cites 9 H. 6. 32.

Br. Non est
Factum, pl.
3. cites S. C.

2. *Contra of the deed of an abbot who is a usurper where there is a lawful abbot at the time &c.* Ibid.

3. *Bond was made by prior and convent, and after the prior was made Bishop of D. and in action against him upon the same bond he pleaded this matter, and that the action shall be upon the successor, and not upon the predecessor* for the corporation is charged only, and a good plea *without traverse*, absque hoc that he alone made the bond. Br. Traverse per &c. pl. 82. cites 21 H. 6. 3.

4. *Debt of contract against the Provost of the college of T. in Cambridge for stuff bought, which came to the use of the college, and that the same provost, viz. T. M. was removed, and the now defendant was elected, and made provost &c. and exception was taken that he did not shew how he was removed, & non allocatur per Cur.* For if he be removed by any way, and the other was provost, it is sufficient, and *this only is traversable, and not the cause of the removing*; for action of debt shall be brought against executors generally, without shewing how they were made executors; for if he be executor it suffices, and the entry of the prothonotary is general, that he was removed, without shewing how, and for what cause. Br. Pleadings, pl. 87. cites 5 E. 4. 70.

5. Where a man pleads payment to the Chamberlain of London, viz. to one J. and his successors &c. according to the form of the condition of the obligation aforesaid, he ought to shew that the said chamberlain was deposed, or the like, and then be paid it to W. N. his successor, who was elected chamberlain &c. by which he pleaded accordingly; for otherwise it shall be intended

tended that the first continued chamberlain; so of an abbot &c. Br. Pleadings, pl. 98. cites 8 E. 4. 18.

6. In debt. the Prior of B. made an obligation without the convent, and after was made an abbot of another house, and the obligee brought debt against him, and declared upon the matter, and the defendant said, that the goods did not come to the use of the house of which he is abbot, and demurred in law upon the declaration; per Vavisor J. this is a body politick, and none shall be charged but the same body politick, and an abbot or prior can take nothing but to use of the house, and when he is made an abbot of another house, he is severed from the first house, and therefore he is discharged, and the convent of the first house shall not be charged, because they were not bound unless the goods came to the use of the house, and if he be deposed, and after re-elected into the same house, yet he shall not be charged, for he is in another course, and all the other justices were to the contrary at this time; but after Rede & Fineux agreed with Vavisor, 5 H. 7. 25. and Wood, Brian, Keeble, and Townsend to the contrary, because he was at all times personable when he was immediately made abbot of another house; contrary where he is deposed and re-elected, and therefore Brook makes a quære, for it is dubious to him; and per Vavisor, 5 H. 7. 25. an abbot may give the goods of the house, and make a charge during the time that he is abbot, and make an obligation, which is good if it be sued during the time that he is abbot, but the successor shall not thereof be charged, and therefore because the capacity by which he is charged is determined, the charge determines, and the best opinion was with him, as it seems, and agreed with Vavisor the principal case, 9 H. 7. 23. Br. Barre, pl. 69, cites 3 H. 7. 11.

B. Abbe, pl. 19. cites S. C. and 5 H. 7. 24.

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7. If the Abbot of B. be bound in an obligation by his own seal, and after is translated to the Abby of St. A. action of debt lies against him as abbot; per Vavisor for law; otherwise it seems where he is deposed, and after is re-elected abbot, in this house, or in another; for there the action was once extinct, contrary here, Br. Nonabilitie, pl. 28. cites 9 H. 7. 29.

(H) Who shall be said the Founder.

[1. **H**E that gave the first possessions to the corporation is the founder, Co. 10. Hospital 33. b. 38 Aff. 22. 50 Aff. 6.]

Jenk. 270. pl. 88. S. P. —Br. Corody, pl. 12. cites S. C.

but S. P. does not clearly appear. —Fitzh. Gmat, pl. 1. cites S. C. & S. P.

[2. [8.] If the king hath a chapel, and gives possessions to it, by which he is the founder thereof, though the seculars are after translated into regulars, yet the king shall be the founder thereof, because he gave the first possessions. 38 Aff. 22.]

Br. Corody, pl. 12. cites S. C. but I do not observe S. P. there. —Fitzh.

Grant, pl. 1. cites S. C. & S. P.

[3. If

Br. Corod-
dies, pl. 2.
cites S. C.
and 44. E.
3. 24. —

[3. If the king and a common person give possessions to a corporation at one and the same time, the king shall be the founder only by his prerogative. 50 Aff. 6. per Knivet.]

If the king and a common person join in a foundation the king is the founder, because it is an intire thing. If a common person founds an abbey, or priory, with possessions of small value, and the king after endows it with great possessions, yet the common person is founder.

If a common person founds a chantery, and after the king translates it, and makes it a monastery, and endows it with possessions, yet the common person is in law the founder because he gave the first living.

So if the translation be from regular to secular, *vel e contra*. 2 Inst. 68.

4. Issue was taken in case of a corody, whether the king was patron of a priory, where he presented one to a corody, by reason that his progenitor founded a chapel there before any priory was there; or whether the Bishop of E. and his predecessors, time out of mind, had been patrons there. And Greene Justice said, that when the king had a chapel of which he was patron, and this was in the hands of the prior, though the seculars were translated into regulars, yet he who gave the first possession was founder, and the jury found for the king. Br. Presentation, pl. 39. cites 38 Aff. 22.

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5. And it was said, that though there was no prior there before, and though the priory was not founded in the place where the chapel was, yet because it was annexed, and the king was the first patron of it, the patronage was the king's; quod nota. Br. Presentation, pl. 39. cites 38 Aff. 22.

6. And because they had made elections of priors there without the king's licence, to the disherison of him and his crown, it was agreed that the king recover the patronage, and that the temporalities be seised into the king's hands for such disherison and contempt, till satisfaction made to him. Ibid.

7. Foundership cannot escheat, for it is not held, that is, it cannot escheat by death without heir; per Brooke. Br. Corodies, pl. 5.

8. Nor can it be forfeited, as Brooke thinks; for it is annexed to the blood, which cannot be divided, as it is said, after the Augmentation-Court took its commencement, in time of H. 8. For a man who is heir to another, cannot make another to be heir. Br. Corodies, pl. 5.

9. If a bishop be founder of a priory and convent, and the crown translates this to a dean and chapter, and discharges the monks of their habit and order, yet the bishop remains founder still. 3 Rep. 74. Dean and Chapter of Norwich's Case.

Br. Prero-
gative, pl. 8.
cites S. C.

10. He that gives the first possession to any corporation is the founder. Jenk. 270. pl. 88.

It is annex-
ed to the
saint, and
cannot be
granted to
any one, and

11. Foundership is an incident inseparable, and is not grantable over. 11 Rep. 78. 2. Magdalen Coll. Case cites Pasch, 7 Eliz. in Scacc. Wharton v. Morley.

and if the church be dissolved, the founder shall have the land. Br. Corodies, pl. 5.

12. A founder having given statutes to the college cannot alter them and give new statutes, unless he had reserved to himself

an

an authority for that purpose. Skin. 513. says this point was agreed in Case of Philips v. Bury.

(H. 2) Considered How. And capable of What.

1. CORPORATION aggregate of several is invisible, immortal, and rests only in intendment and consideration of law; and therefore dean and chapter cannot have predecessor nor successor. 10 Rep. 32. b. cites 39 H. 6. 13. b. 14.

2. Nor can they commit treason, or be outlawed, or excommunicated; for they have no souls, nor can they appear in person but by attorney. 10 Rep. 32. b. cites 21 E. 4. 72. a. and 30 E. 3. 15. b.

3. Corporation aggregate of many cannot do fealty; for a body invisible cannot be in person, nor can swear. 10 Rep. 32. b. cites Br. Fealty, [pl. 15.] 33 H. 8.

4. It never was seen, that a corporation might be bound in a recognizance or statute merchant; per Dyer. Mo. 68. in pl. 182. Trin. 6 Eliz.

Ld. Raym.
Rep. 79.
Faich. 8
W. 3. S. P.
in Case of

Burghill v. Gibbons and Cambridge University, &c.

5. Corporations aggregate of many are not capable of these [279] two protections, either *profectura* or *moratura*, because the corporation itself is invisible, and rests only in consideration of law. Co. Litt. 130. a.

(H. 3) Dissolution; and the Effect thereof.

1. IF the corporation of a prebend be a manor & nient plus, and the manor is recovered from him by title paramount, the corporation remains, for he shall have stallum in choro, and vocem in capitulo, and he is still a prebendary. 3 Rep. 75. b. cites 15 Aff. pl. 8.

2. C. brought annuity against the Dean and Canons of St. Stephen's Westminster, and counts, and the said C. was seised of the said annuity by the hands of M. parson of the parish church of G. predecessor of the said dean and canons. The defendant pleaded, that the said rectory of G. was parcel of the possessions of the Priory of Wells, which priory was parcel of the Priory of St. Stephen's in Normandy, which priory, and the possessions thereof were seised into the king's hands, by reason of the war between K. E. 3. and the King of France, and so continued in his hands till the time of King H. 5. and then the Rectory of G. was appropriated to the said priory time whereof memory &c. which kings continually took the profits, till by Stat. 2 H. 5. it was ordained, that all priories alien, and their manors, rectories &c. in England, which appertained to the

the said priories, or are appropriated or annexed &c. shall be to the king and his heirs, *which lands and rectory came to King E. 4. who by his letters patents granted the priory alien, and the said rectory to the dean and chapter defendants &c.* Upon demurrer, judgment was given for the plaintiff. 2 And. 106, 107. pl. 57. in Case of the Bishop of Rochester v. the Dean and Chapter of Rochester, cites it as Pasch. 18 H. 7. Rot. 416. The Prior of Castle Acre v. the Dean &c. of Westminster.

3. Grant was made to John of Gaunt, Duke of Lancaster, of all *strays within his fees*, and a Prior of Splading held of the grantee certain land in B. in Frankalmoign, and stray came there, and the grantee claimed it by his grant; and the best opinion was, that he shall have it; for he has tenure there, and therefore he has fee there; for if the house be dissolved he shall have the escheat, and the tenant may have writ of mesne, or ne injuste vexes. Br. Patents, pl. 61. cites 7 E. 4. 11.

4. If the abbot and convent gives all their lands and possessions to another in fee, yet the corporation remains. Br. Extinguishment, pl. 35. cites 20 H. 8. per Fitz. J.

5. If a corporation which has a common in gross be determined or dissolved, the common is extinct. Thel. Dig. 20. Lib. 1. cap. 22. f. 28. cites it as the opinion of Pasch. 27 H. 8. 10.

6. If lands holden of J. N. be given to an abbot and his successors, in this case, if the abbot and all the convent die, so that the body politick is dissolved, the donor shall have again his land, and not the lord by escheat. Co. Litt. 13. b.

[280] 7. So if land be given in fee-simple to a dean and chapter, or to a mayor and commonalty, and to their successors, and after such body politick, or incorporate is dissolved, the donor shall have again the land, and not the lord by escheat; and the reason, and the cause of this diversity is, for that in the case of a body politick or incorporate, the fee-simple vested in their politick or incorporate capacity created by the policy of man, and therefore the law does annex a condition in law to every such gift and grant, that if such body politick or incorporate be dissolved, that the donor or grantor shall re-enter; for that the cause of the gift or grant fails, but no such condition is annexed to the estate in fee-simple vested in any man in his natural capacity, but in case where the donor or feoffor reserves to him a tenure, and then the law doth imply a condition in law by way of escheat. Co. Litt. 13. b.

8. The Bishop of R. brought annuity against the Dean and Chapter of R. and declared of an annuity by prescription from the Prior of St. Andrew's of R. which priory was dissolved the 28 H. 8. and 31 H. 8. and their possessions were committed by the king to the Dean and Chapter of R. Anderson said, the annuity does not remain; for an annuity charges the party, and not the possession, and therefore when the corporation is dissolved,

dissolved, which is the person, the annuity is gone; Walmesly said, that in 2 H. 6. 9. it is said there, if a priory be charged with an annuity, the annuity shall continue although it be changed to an abbey. Anderson said, that is true, for there *corporation is changed* only, but here it is *dissolved*; Williams said, that is saved by the 31 H. 8. for annuities are expressed in the saving. But Anderson answered, that this is an annuity, or rent with which the land is charged. Beaumont said, that if it be any thing wherewith the land is charged it is saved, but the person is only charged with this annuity. Walmesly said, that the 21 H. 7. is, that an annuity out of a parsonage is not a mere personal charge, but charges the parson only in respect of the land; and the Court would consider on the case. Ow. 73. Pasch. 38 Eliz. C. B. Rochester (Bishop's) Case.

9. If lands are given to a corporation, and their successors, and the corporation is dissolved, the donor, or his heirs, shall have back the lands again; for the same is a condition in law annexed to the estate, and in such case no writ of escheat lies, yet the land is in him in the nature of an escheat; per Cur. Godb. 211. pl. 301. Mich. 11 Jac. C. B. in Case of the Dean and Chapter of Windfor v. Webb.

10. A prescription was laid in an abbot and convent to be discharged of tithes, and it appeared, that the body corporate was dissolved, because all the monks were dead, and the abbot also, and the lands came to laymen. It was adjudged, that they shall pay tithes in kind, because the prescription was determined by the lands not continuing in the hands of the abbot and convent; for a layman cannot prescribe in non decimando. Godb. 211. pl. 301. Mich. 11 Jac. C. B. The Dean and Canons of Windfor v. Webb.

11. Holt Ch. J. said, that a final judgment for seizure of a Skin, 310, corporation would not, as he thought, be ineffectual, as is 311. in S. C. proved by a judgment for seizure quousque &c. in case of non-appearance, but the liberties of a corporation may be seized, or surrendered, (as in the Dean and Chapter of Norwich's Case 3 Rep.) and yet no seizure or surrender of the corporation itself; the offices and the power of chusing others may be seized into the king's hands, though he cannot exercise them, and he may regrant them. If a corporation to a particular purpose be divested of all its powers and liberties, it is gone, as in case of a charity; but for any other corporation, they have power to make by-laws, and govern the place, though they have their liberties seized; for they continue a corporation, and may act as such, as in the Dean and Chapter of Norwich's Case, that they were useful still as assistant to the bishop. It is not the privilege of the corporation to make by-laws, but it is essential to its being, and part of the constitution. Show. 280, 281. Mich. 3 W. & M. in Case of The King v. Mayor of London.

(1) What

(I) *What Thing dissolves the Corporation.*

[1.] If a corporation be made of *con-freres and sisters*, and after all the *sisters* are dead, all grants and *acts* made by the *con-freres* after are void; for when the *sisters* are dead, this is not any perfect corporation. M. 27 El. B. R. in the Case between Serjeant *Lovelace* and *Manwood* it is there cited to be so.]

[2. If the king makes a corporation, consisting of 12 men, to continue always in succession, and when any of them die, the others may chuse another in his place; if 3 or 4 of them die, yet all acts done by the rest shall be sufficient, for this is not like to the aforesaid case. M. 37 El. B. R. per Curiam.]

Though they grant away all their lands, yet they have *Stallanum in Choro* & *Locum in Capitulo*; per Whitlock, to which Jones agreed, and said, that there is no

necessity of lands, being annexed to the corporation, for there were dean and chapters before any lands were given to them, and though they grant them away, yet the corporation remains; and to this Doderidge agreed, and thence concluded, that *dean and chapter cannot destroy themselves*; for thereby the bishop will lose his counsels and without them he can make no grant, and great inconvenience would follow to the discipline of the church; and therefore *without the bishop they cannot dissolve themselves*; to all which Hide Ch. Justice agreed for the same reasons. Felm. 500, 501. &c. Hill. 3 Car. B. R. in Case of *Hayward v. Fulcher*.—Jo. 168. S. C.

4. If the *corps* of a *prebend* be a *manor*, and nothing more, and the *manor* is recovered from him by *title paramount*, yet his corporation remains; for he has *stallum* in *choro*, & *vocem* in *capitulo*, and he is a *prebendary*, though he has possessions. 3 Rep. 756. cites 15 Aff. 10.

5. If a man is *patron* of a *vicarage* which voids, and he presents to it by the name of *Parsonage*, by this the corporation of *vicarage* is changed into *parsonage*. Br. Corporations, pl. 85. cites 11 H. 6. 18, 19.

6. The creation of a new corporation after the determination of the old one makes another body, so that rent-charges and annuities payable to the old corporation are extinct by the death of all the members, as monks &c. Br. Mortmain, pl. 1. cites 20 H. 6. 7.

7. If the *abbot* and all the *monks* die, the corporation is dissolved, and the *land* shall *escheat*. Br. Corporations, pl. 78. cites 20 H. 6, 7, 8.

8. If

8. If the *master and confreres* of a college are all dead, the corporation is determined. Thel. Dig. 20. Lib. 1. cap. 22. f. 20. cites Trin. 11 E. 4. 4.

9. And so it is of an *abbot and convent*. Thel. Dig. 20. Lib. 1. cap. 22. f. 20. cites Trin. 11 E. 4. 4.

10. But if the *abbot be alive, and the convent all dead*, the corporation is not determined, per Catesby; for he may profess others &c. Thel. Dig. 20. Lib. 1. cap. 22. f. 20. cites Trin. 11 E. 4. 4.

11. But if they sell all the lands and the abbey, yet the corporation remains, per Fitzherbert; but Brook makes a quære, of what he shall be abbot; for there is neither church nor monastery; and makes a quære, if the abbot dies, if they may chuse another, the house being dissolved; monks and canon are capable of spiritualities as to be vicar, executor &c. Br. Corporations, pl. 78. cites 32 H. 8. and Hill. 3 H. 6. 23. [282] Br. N. C. pl. 38. cites S. C. — 3 Rep. 75. b. cites S. C. and says, that without question this is good law, if they were the chapter to a bishop.

12. A corporation was founded by the name of Brothers and Sisters, and all the sisters are dead, and the brothers make lease, and held void, for then it was no corporation. D. 282. b. Marg. pl. 27. cites it as in the time of Queen Eliz. Manwood v. Lovelace.

13. The Dean and Chapter of Wells, by express words, grant and surrender the Deanry of Wells &c. yet this was not thought sure till the grant and surrender was established by act of parliament, and though all bishopricks were of the foundation of the Kings of England, and therefore in ancient time were donative, and given by the kings, as appears in 17 E. 3. 40. and by the Statute 25 E. 3. de Provisionibus, yet afterwards (as appears by the said book and the said act) the bishopricks became by the grants of the kings eligible by their chapter, and therefore if by the surrender of the dean and chapter their corporation shall be dissolved, this will introduce 3 inconveniences; 1st, To the bishop concerning his assistance in his episcopal function. 2dly, To the bishop and others touching the confirmation of his grants. 3dly, To all the church in general. For how can there be a bishop chosen in such cases? 3 Rep. 75. b. 76. a. cites D. 273. pl. 35, 36 &c. 10 Eliz. [Walrond v. Pollard.

14. By the death of all the natural persons of which the corporation consists, it is dissolved. And. 210. pl. 238. Hill. 29 Eliz. in Case of Marriot v. Mascall.

Br. Mortmain pl. 1. cites 20 H. 6. 7.

15. H. 8. translated the Abbot and Prior of Norwich by his letters patents, and created them by the name of dean and chapter who surrendered their possessions to Ed. 6. and afterwards Ed. 6. incorporated them by the name of Decani & Capituli ex Fundatione Ed. 6. And afterwards he granted their possessions to them by the name of Dean and Chapter, Sanctæ individue Trinitat. Norf. omitting these words (ex Fundatione Ed. 6.) It was adjudged in this case; 1st, That all translations made by H. 8. of prior and convent, unto dean and chapters, were good by the

Statute of 25 H. 8. 2dly, Resolved, that by the surrender made to Ed. 6. the corporation of dean and chapter was not gone; for although they departed with their possessions, yet for necessity the corporation did remain, for their assistance of the bishop. 3dly, Admitting their ancient corporation was surrendered, and the new corporation made by Ed. 6. was good, and that the words omitted, viz. Ex. Fundatione Ed. 6. were material, yet the grant made to them was good, notwithstanding this misnomer, by the Statute of 1 Ed. 6. cap. 8. of Confirmations. Hughes's Abr. 967. pl. 1. tit. Founder and Foundation cites 3 Rep. 74. [Mich. 40 & 41 Eliz.] Norwich Dean and Chapter's Case.

16. If a *prior and convent* be translated concurrentibus iis quæ in jure requiruntur to an abbot and convent, or to a dean and chapter, these though the name be changed, yet the body was never dissolved, but in effect it remaineth still. Co. Litt. 102. b.

[283] 17. Dean and Chapter of N. incorporated grant and surrender totam ecclesiam suam cathedralam &c. to E. 6. This does not dissolve the corporation. Palm. 491, 492. 501, 502, 503. Hill. 3 Car. B. R. Hayward v. Fulcher.

18. If a corporation, that hath been by prescription, accepts a new charter, wherein some alteration is of that name, and likewise of the method in the governing part, yet their power to remove, and other franchises which they had time out of mind, do continue, per Cur. 1 Vent. 355. Trin. 33 Car. 2. B. R. in Haddock's Case.

S. P. adjudged. 2 Show. 278. in Case of Quo Warranto v. City of London.

19. A corporation may be dissolved; for it is created upon a trust, and if that be broken it is forfeited, but a judgment of seisure cannot be proper in such a case; for if it be dissolved, to what purpose should it be seised? per Cur. 4 Mod. 58. Mich. 3 W. & M. in B. R. in Sir James Smith's Case.

20. If a corporation may be seised nomine districtonis, or otherwise, it is dissolved; for when it is merged in the crown the king may make a new one, but cannot restore the old; a corporation is something besides franchises, for it is a capacity to hold as a natural body, and though it may cease to be in actu exercito, yet it may be actu signato. Neither does a seisure of office dissolve one; for on making a corporation, the king may reserve the naming of officers to himself, and suspend it for a time, per Eyre J. 12 Mod. 18. Hill. 3 & 4 W. & M. in Case of the King v. the Mayor of London.

21. It was a quære, whether a corporation could be dissolved, but sure it may; it is such a franchise as may be forfeited; but a judgment of seisure is no proper judgment to dissolve a corporation; per Holt Ch. J. 12 Mod. 18. Hill. 3 W. & M. in Case of the King v. the Mayor of London.

22. By a surrender of liberties and privileges the corporation is not dissolved; per Holt Ch. J. 12 Mod. 19. cites 3 Rep. Dean and Chapter of Norwich's Case, and Jo. 166.

Show. 280. The King v. the

23. Agreed, if a corporation were made to a particular purpose and they divest themselves of all right, so that they cannot

not answer the end of their institution, it is thereby dissolved; as in the case of a private corporation for *charity*, before the restraining statute; but if the end of a corporation remained, as in a borough, to *make bye-laws* and govern it, the corporation remains still, and the making of bye-laws is no franchise, but part of the constitution; per Holt Ch. J. 12 Mod. 19. Hill. 3 & 4 W. & M. in Sir J. Smith's Case.

Mayor of London, S. C. & S. P. by Holt Ch. J.

24. A body politick, to which a trust is annexed, and *male administration* of it is cause of forfeiture, and it may be dissolved; and for this was cited the *Statute of Quo Warranto*, where if the corporation does *not appear upon summons*, the franchise shall be seized into the king's hands *nomine districtiois*, and if it does *not come during the eyre* it was lost for ever. Skin. 310. Hill. 3 W. & M. B. R. The King v. the City of London.

25. By Parker Ch. J. if a *mayor is not chosen at the time prescribed by the charter*, and there is *no provision* in the charter for the old mayor's continuing on until a new mayor is chosen in, the corporation is dissolved, and consequently cannot proceed to a new election; indeed some are of opinion, that this may be cured, by the *issuing out of a writ under the great seal, empowering them to proceed to a new election*; but others are of opinion, that even this will not do, and that there is *no other remedy but to obtain a new charter from the crown*; but no body ever thought, that in such a case, the quondam corporation could revive itself by choosing a new head, without such a writ under the great seal. 10 Mod. 346. Mich. 3 Geo. 1. B. R. Corporation of Banbury's Case.

26. The question was, whether by *surrender of a charter* the corporation was wholly dissolved, and the very being of it destroyed? 3 of the Judges held, that it was not, and compared it to the surrender of a deed, that the estate was not thereby surrendered, therefore the corporation was still subsisting, and had a capacity to take, and by the charter of King William did retake, and it would be very inconvenient if it should be otherwise; that is if they could give up more by a surrender than they can take by a regrant. In the great CASE OF THE CITY OF LONDON, several learned men were of opinion, that a surrender did not destroy the being of a corporation; this appears by the surrender of abbeys in the reign of H. 8. for it was not thought proper at that time to rest purely on these surrenders, but to have them confirmed by act of parliament. One of the judges held, that though *barely* by the surrender of this charter, the corporation was not dissolved, yet there were other words in it, by which they gave up all the liberties and privileges which they then enjoyed, by which words the very being of this corporation was dissolved; but this being a case of great weight, it was adjourned farther to be argued. 8 Mod. 361, 362. Pasch. 11 Geo. The King v. Grey.

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(I. 2) Customs. Confirmed. How.

1. **N**OTE, by Keeling J. that several of the ancient statutes that were made for private cities, have *only a memorandum upon the roll, viz. that all customs &c. are confirmed*, and the parties have this *exemplified, with express mention of the particular customs*, and in particular some of the ancient statutes which confirmed the customs of London are so, and then be the customs reasonable or unreasonable, when they are so confirmed they are good, and he said he had viewed rolls to be so. Sid. 251. Pasch. 17 Car. 2. B.R. in Case of Wilkinfon v. Bolton.

(I. 3) Of taking or renewing a New Charter, and the Effects thereof.

3. C. cited Mo. 587. as held in the Exchequer-Chamber by Portington, in the Abbot of St. Bartholomew's Case

1. **I**F *bailiffs* of a vill *have liberties* by charter of the king, and after the *king makes them sheriffs*, and that they shall implead and be impleaded by the same name, yet their liberties remain good to them, per Portington, quod fuit concessum; and by him the grant is good without allowance; but per Paston and June, the grant is not good without shewing allowance. Br. Patents, pl. 27. cites 14 H. 6. 12.

that the sheriffs shall hold the liberties which were given to the bailiffs, and cites 21 E. 4. 55. the Case of Norwich, in which it was held, that all grants made *Inhabitanti bus ac probis Hominibus aut Civibus* shall be enjoyed by the corporation of the same place, when they are afterwards incorporated by the name of the Mayor and Commonalty, or otherwise; and cited also D. 279. [b. pl. 10. Mich.] 10 & 11 Eliz. where those of York prescribed as mayor, bailiffs, and citizens to take and seise as forfeited goods there foreign bought, and foreign sold till 1 R. 2. at which time they were incorporated by the name of Mayor, Sheriffs, and Citizens, and then they claimed this custom as mayor, bailiffs, and citizens, and held good; and the whole Court and Coke attorney agreed, that in the last name of corporation all shall be enjoyed, which was gained by prescription or grant in the precedent name.

By the alteration or
* change of
name a corporation
does not
lose its franchises. 4
Rep. 87.
Lutterel's
Case. —

Saund. 344.
in Case of

Mellor v. Spateman. — Per Tirrel J. Cart. 118. cites 5 Rep. 8a. Snelling's Case. — Agreed per Cur. Mo. 581. — Raym. 439. — Nor does it determine an annuity granted before the change of the name. 2 And. 107. in Case of Bishop of Rochester v. Dean and Chapter of Rochester.

* S. P. and so of the *method of the governing part*, yet their power to remove, and other franchises which they had time out of mind &c. do continue. Vent. 355. Haddock's Case. — It was agreed that where a corporation is by name of Commonalty, and after by another grant they have *bailiffs*, yet by this change they shall not be discharged of covenants, annuities &c. to which they were bound before, and by the same reason it seems that they shall retain the lands and possessions which they had before. Br. Corporations, pl. 3. cites 2 H. 6. 9.

3. If a *patent* of certain lands are made to *J. S.* and *J. S.* is afterwards *confirmed* by the bishop *by the name of T. S.* notwithstanding this change of his name the land remains with *T. S.* But if after the confirmation, a patent had been made to *J. S.* it had been void; for confirmation by the bishop is as 2d baptism, and changes the name; so in the principal case, if after a new corporation a patent had been made to them by the name of their old corporation; such patent had been void. Every one is bound to know his own name, and not the name of another. Jenk 100. pl. 94.

4. A prior and covent had been of ancient time; the king after time of memory, by the licence of the pope and the ordinary, had *translated the priory into a deanry and chapter of men secular*, and granted that they should be impleaded, and might implead by such name &c. It was held, that such *new corporation might sue for the annuity which the prior and his covent had by prescription* from time &c. Thel. Dig. 20. Lib. 1. cap. 22. f. 23. cites 39 H. 6. 13, 14. and says, See 50 E. 3. 27.

5. If a man *recovers against a vicar an annuity*, and *before execution the vicarage is united to the parsonage*, yet the plaintiff shall have *execution against the parson*. Br. Corporations, pl. 61. cites 20 E. 4. 6.

6. It was held by Brian, that if the *Bailiffs and Commonalty* of London had *granted an annuity*, and *after they had had mayor and sheriffs* by grant of the king, the *grantee might have action against them by their new name*. Thel. Dig. 20. Lib. 1. cap. 22. f. 24. cites Trin. 20 E. 4. 6. and says, See 21 E. 4. 59. the saying of Choke.

7. But it is a doubt in such case, *how a man ought to sue scire facias against the new corporation out of a recovery had against the old corporation*, as appears 2 H. 6. 9. in the Case of the Commonalty of Shrewsbury. Thel. Dig. 20. Lib. 1. cap. 22. f. 24.

8. Where the *Bailiffs of L. grant an annuity to me*, and *after are made mayor and sheriffs*, I may have action of this against the new corporation. Br. Corporations, pl. 61. cites 20 E. 4. 6.

9. If a *prior be bound in an obligation*, and the king alters the corporation, and makes him an abbot, yet the first suit shall remain. Br. Abbe, pl. 13. cites 3 H. 7. 11. and 5. H. 7. 24. Per Brian.

10. It was adjudged, where *one corporation is duly united and annexed to another corporation*, that *the corporation to which the union is made shall have action upon cause of action accrued of a thing which was of the possession or right of the other corporation*. Thel. Dig. 20. Lib. 1. cap. 22. f. 27. cites 11 H. 7. 8. & 26. And that so agrees Trin. 50 E. 3. 27. [286]

11. If a corporation grants the office of town clerk, or recorder, and after *surrenders their patent, and takes a new one*

by a new name, all the offices are determined. Hutt. 87. Hill, 2 Car. in Sir Charles Howard's Case.

12. *Debt* was due to an old corporation, and they were incorporated by a *new name* and brought action in their new name, and recovered, 3 Lev. 237. Mich. 1 Jac. 2. C. B. Mayor's Case of Scarborough v. Butler.

Ld. Raym.
Rep. 39.
S. C. and
S. P. per
Holt Ch. J.
and G.

13. Where a corporation takes a *new charter* concerning ancient liberties, they may use it either by way of grant or of confirmation; per Holt Ch. J. and Eyre J. Comb. 316. Hill. 6 W. 3. B. R. in Case of the King v. Larwood.

Eyre J. ——— The new charter does not merge or extinguish any of the ancient privileges. ——— Raym. 439. Pasch. 33 Car. 1. B. R. Haddock's Case. ——— Vent. 355. S. C. ——— And if it be only as a confirmation, the ancient customs, before the new charter, may be pleaded to have been time out of mind. See Carth. 228. Vaughan v. Lewis.

14. If a corporation *refuses a new charter*, it is then void; but when they accept, and put it in execution, then it is good; per Holt Ch. J. Comb. 316, Hill, 6 W. 3. B. R. in Case of the King v. Larwood.

S. P. in a
Quo War-
ranto held
per Cur. ac-
cordingly.
12 Mod.
253. Mich.
10 W. 3. in
Case of Pi-
per v. Den-
nis.

15. Plaintiff brought case for a false return to a mandamus, commanding him to swear Harris to be Mayor of Dartmouth, and a peremptory mandamus moved for. It was resolved by the Court, that if there be an *old charter surrendered*, but *surrender not enrolled*, and a new charter in consideration of the surrender granted, that the *second charter* is void, because they act under a void charter; but otherwise if it be the *same members* in the old charter, because then they act by their first charter, which is still good. So, if in the first case, they had *given a bond*, and put the seal of the new corporation to it, it would be void, as was adjudged in the Case of BATH AND WELLS; but if the members of the old charter had gone to *election*, and some by colour of the new charter had voted with them against their will, there a choice by majority of the old charter, with some mentioned in the new, is good, 12 Mod. 247, Mich. 10 W. 3. Bully v. Palmer.

16. Where those that were *members under an old charter* happen to be the *only acting persons in a matter relating to the corporation*, they shall be deemed to act by virtue of the ancient and true right, but if commixed with others that were only members under the new charter though the old members were the majority, yet then must be taken to act by virtue of the new charter, and then what they did was void. 1 Salk. 191. pl. 1. Trin. 11 W. 3. B. R. Resolved in Case of Butler v. Palmer.

17. Where the *new charter alters the constitution* of the corporation, and new models it, there they shall lose their old name; otherwise, if the constitution as to all the integral parts of it remains the same, though the new charter gives them a new name, the old one remains; for the purpose if the mayor be added, or a mayor and masters are made mayor and aldermen, or an abbot or convent, a dean and chapter, there they lose their old

old name, because new integral parts of the corporation are added; but if the inhabitants of G. were incorporated by the name of Bailiffs, Burgesſes, and Commonalty of G. and then a new charter is granted to them, that they ſhall be called by the name of Bailiffs, Burgesſes, and Commonalty of G. yet [287] they may uſe the firſt name, becauſe the town is the ſame, and the old conſtitution remains; per Holt Ch. J. 2 Lord Raym. Rep. 1239. Hill. 4 Ann. in Caſe of the Queen v. Iptwich Bailiffs &c.

(I. 4) New Charter. Pleadings.

1. **I**N writ of covenant the caſe was, that the *Commonalty of S. made compoſition* with the Abbot of W. and after they by another grant had bailiffs, and by the beſt opinion now the ſuit ſhall be againſt the bailiffs and commonalty, and not againſt the commonalty only according to their ſpecialty, for by matter *ex poſt faſto* a man may vary from his ſpecialty. Br. Variance, pl. 1. cites 2 H. 6. 9.

2. A prior and his predeceſſors had been ſeiſed of an annuity time out of mind, and by licence of the king, the pope, and the ordinary, tranſlated it into dean and chapter, and the dean and chapter brought annuity, and preſcribed to him and his predeceſſors, and did not ſay deans of the ſame place; the defendant ſhewed the tranſlation within time of memory, abſque hoc that the dean and chapter and his predeceſſors deans there have been ſeiſed made and forma &c. and after the ſpecial matter was entered in the roll with the traverse, except thoſe words, then Dean &c. [which] were omitted by award of the Court; and per Priſot, the defendant may traverse the preſcription generally, and give the ſpecial matter in evidence, and demurr upon the tranſlation given in evidence by the plaintiff, or plead the ſpecial matter by eſtoppel by the record of the tranſlation, and demur in law upon the other, upon this matter, and ſo ſee that it is doubted here, if they may preſcribe in this form by the ſeiſin of the prior &c. Br. Preſcription, pl. 42, cites 39 H. 6. 13. — But ſee thereof 22 E. 4. 43, 44, and the form of that preſcription 7 E. 4. 32. & 20 E. 4. 6. Ibid.

3. Where a prior is made abbot, and the corporation changed from a prior into an abbot, it was touched, that if ſuch abbot will preſcribe in right of the houſe, he ought to ſhew that the prior and his predeceſſors time out of mind &c. and that after he was profeſſed an abbot, and that after the abbot and his ſucceſſors &c. have been ſeiſed &c. Br. Preſcriptions, pl. 70, cites 7 E. 4. 32.

(K) *What Things a Corporation may do without Deed.*

Cro. E. 815. [1. A Corporation aggregate cannot without deed command their
 pl. 5. S. C. bailiff to enter into certain lands of their lease for years
 adjudged. for a condition broke; for such command without deed is void.
 — 4 Rep. P. 43 El. B. R. between *Dumper and Sims* adjudged.]
 119. b. S. C. but I do not
 observe S. P. — Vent. 48. Arg. cites S. C.

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Br. Cove-
 nant pl. 15.
 cites S. C.
 * Contra if
 it be made
 by another
 particular
 person Br.
 Corpora-
 tions, pl. 74.
 cites 48. E.
 3. 17.

2. *Covenant* was brought by the Mayor and Commonalty of N. against the Mayor and Commonalty of D. and counted, that the defendants by their deed had covenanted that the plaintiffs should be quit of murage, pontage, custom, and toll in D. of all those in N. and that they of N. had taken toll by certain of their burgesses of certain of the Burgesses of N. wrongfully &c. And there adjudged, that the taking of the * common servant is the taking of the corporation, and so the covenant broken; quod nota; and it is not mentioned there if the servant was servant by specialty under the common seal of the corporation, or not. Br. Corporations, pl. 14. cites 48 E. 3. 17.

3. Mayor and commonalty cannot disseise another unless the use of themselves; contra it seems if one enters for them by authority in writing under their common seal, where their entry is not lawful. Br. Corporations, pl. 24. cites 8 H. 6. 1. 14.

Arg. Mod.
 18. cites 12
 H. 4. 17.

4. They cannot licence one to take trees without deed, Arg. Vent. 48. cites 9 E. 4. 39.

Jenk. 131.
 pl. 68. cites
 8. C.

5. Per Littleton, the opinion of all the Justices of both benches is, that assignment of auditors by corporations is good without deed. Br. Corporations, pl. 56. cites 12 E. 4. 9. 10.

6. So of justification by their command. Br. Corporations, pl. 56. cites 12 E. 4. 9. 10.

7. So of command of a covenant, in the time of vacation, to cut their trees, and other necessities. Br. Corporations, pl. 56. cites 12 E. 4. 9. 10.

8. Lease of land by an abbot for years is not void by his death, but voidable only, because it may be leased without deed, and by receipt of the rent by the successor the lease is good; but if abbot grants a villein, or rent, or the like, which passes not by deed, and dies, there by death of the abbot the grant is void. Br. Leases, pl. 41. cites 21 E. 4. 5. 6.

9. Trespass by the Master and Chaplains of B. of a house and close broken in London; the defendant pleaded licence of the parties to come into the house to talk with them, and Pigot demurred in law, because the licence was by parol, and not pleaded by deed, and therefore ill; for a licence by a corporation &c. shall be by writing. Br. Licences &c. pl. 16. cites 21 E. 4. 15. 19.

10. Dean and chapter may retain and assign bailiff, receiver, or other servant, without writing, per Townsend Justice; but Brian Ch. J. contra, and that he cannot be servant without writing, nor demand his salary without writing. Br. Corporations, pl. 47. cites 4 H. 7. 6.

11. But they may charge a man for his occupation without deed, as guardian in soccage, bailiff of the king, and receiver of his own head &c. per Brian Ch. J. and he was precise, and adjournatur. Br. Ibid.

12. A corporation cannot be aiding to a trespass, nor give warrant to do a trespass without writing; quod nota. Br. Corporations, pl. 48. cites 4 H. 7. 13.

13. A servant may justify by command of a body politick without having deed of the commandment, per Townsend; but Brian contra, and that they can do nothing without writing. Br. Corporations, pl. 49. cites 4 H. 7. 17.

14. They cannot make themselves disseisers by their assent without deed. Vent. 48. Arg. cites 7 H. 7. 9.

Arg. Mod.
18. cites 9
E. 4. 59.—
Br. Corpo-

ration, 24. 34. 14 H. 7. 1. 7 H. 7. 9.———S. P. per Hufley, and that they cannot enter into and without commandment given by deed. Br. Corporations, pl. 50. cites 7 H. 7. 9.

15. In trespass the defendant said, that it was the frank- [289]
enement of the president and scholars of C. and he as servant to them, and by their command entered &c. and per Keeble, he cannot be retained with a corporation without specialty, nor make a feoffment without specialty. Br. Corporations, pl. 50. cites 7 H. 7. 9.

16. But of petit things there needs no writing, as to light a candle, make hay, or fire, nor to put beasts out of his land, per Wood; Oxenbridge contra, for those things belong to a servant to do without command, but entry &c. ought to be by deed; and Fairfax accordingly of the petit things, but that corporation cannot have a servant but by deed; and Tremail agreed with Wood of the petit things aforesaid, by reason of the usage, and of the great trouble which shall be to the contrary, but not by the law, therefore quære, Br. Ibid.

But for ordi-
nary employ-
ments and
services a
corporation
may ap-
point a ser-
vant with-
out deed,
as a cook,
butler &c.
Mod. 18.

Arg. agreed,
Vent. 47. Arg.
cites 4 E. 4. 8.———Br. Corporations, 59.———3 Wms's Rep. 423. Arg. cites Pl. C. 91. b.
& a Sand. 305.

17. One cannot appear in assise as bailiff to a corporation without deed. Vent. 48. Arg. cites 12 H. 7. 27.

18. Command of the mayor to enter into land for the corporation is good without writing, contra of command of the commonalty, chapter &c. contra it seems of the command of the mayor and commonalty. Br. Corporations, pl. 96. cites 16 H. 7. 2.

19. Corporation cannot present a clerk unless by writing under the common seal. Br. Corporations, pl. 83. cites 13 H. 8. 12.

20. But

20. But they may make attorney in court of record without other writing than the record; for record is a strong writing. Br. Corporations, pl. 83. cites 13 H. 8. 12.

21. So to certify their mayor in the Exchequer; for this is entered of record, and so is the use for London at this day. Br. Corporations, pl. 83. cites 13 H. 8. 12.

22. A corporation cannot *do a tort* but by their writings under their common seal; per Fitzjames Justice. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

23. All acts which a corporation does shall be by their name of corporation, and by writing, and otherwise ill; and yet by two justices they may present, and the pleading is good, without saying that the presentment was by writing, for the law implies it; but two others contra. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

24. The election of dean, master, &c. and the making of their attorney, which are of record, are good without their writing under common seal; but in feoffment to the dean and chapter they cannot take but by letter of attorney under seal; per Brook Justice. Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

25. Note, per Cur. that he who distrains as bailiff of a corporation, and is not bailiff, may make conusance &c. if they agree to it, and good without deed; and the case was, that one of the corporation distrained in right of the corporation, and had not their deed; nota, Br. Corporation, pl. 2. cites 26 H. 8. 18.

26. Though the law is, that a bailiff may justify in trespass as bailiff to a corporation without a deed, yet it is not like to a bailiff in an assise; and it was said, that a bailiff of a maner shall not have debt for his salary against a corporation without a deed. Plowd. 91. b. Trin. 3 Mar. Arg. in Assise of Fresh-Force brought in London by Pannel v. Moore,

[290] 27. If the sheriff makes his warrant to a corporation who have return of writs, to arrest a person, they make a bailiff without writing by parol only. Agreed by all the Justices in B. R. Mo. 552. pl. 744. Hill. 33. Eliz. Vavisor's Case.

And so a stranger may receive a deed to his use without letter of attorney. Cro. E. 862. S. C.

28. A. seised of land granted 40l. rent to a college. A. sealed his part of the indenture, and delivered it to one J. S. to the use of the master and fellows, and for him to deliver accordingly, but there was no deed to shew their receipt of it, and then they sealed the other part, but made no attorney to deliver it; adjudged good without a letter of attorney, for their sealing the counter-part is a sufficient agreement to the grant. Ow. 144. Trin. 40 Eliz. Goodrick v. Cooper.

Cro. E. 862. pl. 39. S. C. adjudged.

29. If a reversion is granted to a corporation by deed, though they cannot accept of this but by attorney, yet if they bring waste it is a sufficient agreement to vest it in them; per Walmesly. Ow. 143. Trin. 40 Eliz. C. B. in the Case of Goodrick v. Cooper.

30. A corporation aggregate of many cannot make a lease for years without deed, in respect of the quality of the incorporation,

poration, but the lessee may assign it over without deed, Co. Litt. 85. a.

31. A man may *enfeoff* an abbot, a bishop, a parson &c. or any other *sole body politick*, by deed, or without deed, in free-*alms*; but if lands be given to a dean and chapter, or any other corporation aggregate of many, there the gift must be by deed, Co. Litt. 94. b.

32. Where a corporation has an estate *pur auter vie*, if they *attorn* to the reversioner, it must be by deed; for though the grantee does not claim in by those that attorn, and that an attornment is no more than consent, yet in pleading the deed of attornment ought to be shewn; for in such a case a deed is requisite *ex institutione legis*; but when a deed is requisite *ex provisione hominis*, there the provision of man shall not change the judgment of law in such case. 6 Rep. 38. b. Pasch. 3 Jac. C. B. in Bellamy's Case,

S. C. cited
Arg. 3.
Wms's Rep.
426. Mich.
1712. in
Domes. Proc.

33. Church-wardens were incorporated by act of parliament, and afterwards the queen demised a rectory to them for 21 years, and afterwards by letters patents, reciting the first grant, and that the church-wardens *modo habentes & ad præsens possidentes* had surrendered all their estate for years &c. *in consideration of the said surrender, and for fine of 20l. &c. demised the said rectory to them for 50 years.* It was adjudged, that there need not be any actual surrender of the first lease, because the words in the second lease, (*viz.*) *Modo habentes & ad præsens possidentes* import that they were then possessed of the first lease, and their acceptance of the new lease for 50 years was, in judgment of law, a surrender of the first lease for 21 years, and shall precede it, and that a corporation may make a surrender of their term by an act in law, without writing, though not an express surrender without writing. And the reporter adds, that he had seen several other letters patents made on the like consideration of a surrender, with the words (*Modo habens & possidens*) in none of which there was ever any actual surrender made. 10 Rep. 66. b. Trin. 11 Jac. in Scacc. Church-Wardens of St. Saviour's Case.

34. *Trespass* for carrying away divers loads of wheat; the defendant justified under the Dean and Chapter of N. that they were seised in fee of rectory of H. wherein the said corn was growing, and severed from the 9 parts, which he took by their command. The plaintiff replies, that the dean &c. were seised, and demised the rectory to G. for 99 years, which by mean assignments came to the plaintiff. The defendant rejoined, that one of the mesne assignees by feoffment conveyed the said rectory to one W. W. whereupon the dean &c. entered into the said rectory as a forfeiture, and that the corn being severed and set out for tithes, he took them by command of the said dean &c. Exception was taken, because he pleaded an entry after the forfeiture, and did not shew a deed of command to enter, sed non allocatur; for it is not pleaded that any entered by their command after the forfeiture, but that the dean &c.

S. C. cited.
Arg. 2.
Saund. 305.

&c. themselves entered, which shall be intended a sufficient entry, and all necessary circumstances shall be implied; besides the *feoffment* is not only a forfeiture, but a *disseisin*, being by tenant for years, and then every one may enter on their behalf where they have a right of entry. Cro. Car. 169, 170. pl. 16. Mich. 5 Car. B. R. Edgar v. Sorrell.

A corporation aggregate cannot, without deed, empower any third person to seize goods for their use as forfeited. Sid. 441. pl. 12. Hill. 21 & 22 Car. 2. B. R. Horne v. Ivy.

35. In *trespass* for taking away a ship, the defendant justified under the patent, whereby the Canary Company is incorporated, that none but such and such should trade thither, on pain of forfeiting their ships and goods &c. and said, that the defendant did trade thither. Plaintiff demurred, because he did not *show* the deed whereby the company were authorized to seize the goods. Twifden thought they could not seize without deed, any more than they could enter for condition broken without deed; but adjournatur to be argued whether this was a monopoly or not. Mod. 18. pl. 48. Mich. 21 Car. 2. B. R. Horn v. Ivy.

Ivy. — Vent: 47. S. C. curia advisare vult, but the reporter cites Sid. 441. that judgment was given for the plaintiff. — 2 Keb. 567. pl. 7a. S. C. adjournatur. — Ibid. 604. pl. 33. S. C. & S. P. agreed and judgment for the plaintiff. — S. C. cited 3 Wms's Rep. 424. Mich. 1717. Arg. and says, that the books are, that the seizing of goods for the use of a corporation is an extraordinary, and not a common service; and says, that this shews that a corporation can no more give an authority as to personal things, than as to any real estate.

Lev. 306. S. C. says the court said nothing to this point; but gave judgment for the plaintiff upon another point for the insensibility. — Vent. 98, 99. S. C. adjournatur. — 2 Saund.

36. In *debt on a lease for tithes*, rendering 50l. a year, the defendant pleaded, that before any of the rent incurred he assigned over the said lease and tithes, of which the plaintiff had notice, and did receive the rent before due from the assignee. It was insisted, that this acceptance shall not bind the corporation, because they can do nothing but by attorney or bailiff made under their common seal, and cannot by themselves take notice of this assignment. Twifden J. said, that this point was resolved in Magdalen College's Case, 11 Rep. 79, a. to be a void acceptance. Adjournatur. Raym. 194, 195. Mich. 22 Car. 2. B. R. Windfor (Dean and Chapter) v. Gover [als. Gower.]

302. S. C. and Ibid. 306. says, he thinks that judgment was given upon that other point, because they would not determine the matter in law.

S. C. cited Arg. 3 Wms's Rep. 423.

37. *Consuance*, as bailiff of a corporation, without showing a precept in writing, was adjudged good. 3 Lev. 107. Mich. 34 Car. 2. C. B. Manby v. Long.

38. In *ejectment*, the plaintiff declared on a demise made by a corporation, but did not set forth that it was by deed, or under the seal of the corporation, and upon Not Guilty, the plaintiff had a verdict, and judgment, and this was alleged for error; but judgment was affirmed, for declarations in ejectment are grounded now on fictions only, so that in such case the law is altered from what it was formerly. Carth. 390. Mich. 8 W. 3. B. R. Patrick v. Ball.

39. Where a corporation has a head (as a mayor) he may command a thing *in person*; but a corporation aggregate, which has no head, must give their authority *under the seal* of the corporation. 2 Lutw. 1497. Hill. 12 W. 3. C.B. Randle v. Dean, cites 16 H. 7. 2. b.

A corporation aggregate may appoint a bailiff to distrain without deed or warrant, as

well as a *cook or butler*; for it neither vests nor divests any sort of interest in or out of the corporation. 1 Salk. 191. cites it as so held between Cary and Matthews in Cam. Scacc. — S. C. cited Arg. 3 Wms's Rep. 425. Mich. 1717. in Domo Proc.

40. Though a corporation cannot do an *act in pais* without [292] their *common seal*, yet they may do no act upon record, because they are estopped by the record to say it is not their act. 1 Salk. 192. pl. 4. Hill. 1 Ann. B. R. The Mayor of Thetford's Case.

3 Salk. 103. S. C. accordingly. — 6 Mod. 25. S. C. but S. P. does not appear.

41. A corporation made a *contract for letting the market* at Bridport in Dorset, though not in writing, being from year to year, and held to be good. At Dorchester Assizes 1749. Coram King Ch. J.

(K. 2) Of Executing Deeds by a Corporation.

1. IF abbot and covent make a deed, and do not deliver it *but by attorney*, this attorney ought to have letter of attorney of them to deliver it; per Choke and Jenny. Br. Corporations, pl. 72. cites 9 E. 4. 39.

2. Corporation may make a deed out of their house, for all may come out to another place &c. but if it be dated in the Chapter-House it cannot be [delivered] in another place. Br. Corporations, pl. 72. cites 9 Ed. 4. 39.

3. The abbot and covent may make a deed in another county than where the abbey is, and this by the best opinion of the Court. Br. Lieu, pl. 63. cites 21 E. 4. 26.

4. Dean and chapter made a lease, rendering rents, and for default of payment to re-enter. The rent was not paid, whereupon they made a lease to the plaintiff, and in their Chapter-House put their seal to it, and made a letter of attorney to J. S. to enter, and deliver the deed upon the land. It was objected, that the 2d lease not good, because the dean and chapter let it in the Chapter-House by setting their seal to it, which made it a perfect deed, and so there could be no other delivery; and therefore the first lessee continuing in possession, and they out of possession, the lease was void; and the delivery by the attorney, it having a former delivery, is void; fed non allocatur; for there is no other means for a corporation to make a lease but this. Cro. E. 197. pl. 3. Hill. 32 Eliz. B. R. Willis v. Jermin.

2 Le. 97. pl. 119. S. C. agreed accordingly by the whole court. — S. P. Vent. 257. Paich. 26 Car. 2. B. R. Anon. and held to be a good lease; for though the putting of a seal of a corporation aggregate to a deed carries

ries with it a delivery, yet the letter of attorney to deliver it upon the land shall suspend the operations of it till then.

5. If a *person pretending to be mayor of a corporation, puts the corporation seal to a deed, yet it is not by that the deed of the corporation; per Holt Ch. J. 12 Mod. 423. Mich. 12 W. 3.*

[293] (K. 3) What Actions or Remedy the Successor shall have for Things done in the Time of his Predecessor &c.

1. IF a *disseisin be made to a dean, or an erroneous judgment, or false oath, and he dies, his successor shall not have assise of novel disseisin, but a writ of entry sur disseisin in the quibus, or a writ of error, or attain, and name him, because he was not party to the judgment. D. 86. b. pl. 97. Pasch. 7 E. 6. in the New Serjeant's Case. Alias, Bristol (Dean and Chapter) v. Clerk.*

2. But where the *dean is seised in common with the chapter, that though he dies, yet his successor, and the chapter together, shall have assise of novel disseisin or error, or attain, without naming the name of the dean in certain, because the dean does not die, but continues for ever. Ibid.*

3. An abbot may have a writ of *quod permittant of a disseisin made to his predecessor, and shall make mention of the disseisin in his writ. F. N. B. 123 (H) And so may a Parson. F. N. B. 123. (L)*

4. When a *dean, bishop, prebendary, abbot, prior, master of an hospital, alien the lands which they have in right of their house &c. without the assent &c. the successor may have a writ de sine assensu capituli, and it may be in the per, cui or post. F. N. B. 194 (I) a prebendary may have a juris utrum. F. N. B. 194. (M)*

5. A master of an hospital may have trespass for goods taken away in the time of his predecessors. F. N. B. 89. (G.)

And so of an abbot or prior. Ibid.

(H) —

But a *Replevin* will lie in such a case by the common law, but not trespass till the Statute of Marlebridge. Br. Replegiare, pl. 2: cites 9 H. 6. 25.

6. If a *man disseises a corporation, and levies a fine, and 5 years pass, the statute of the 4 H. 7. doth extend to them, if they are such corporations as have of themselves an absolute estate and authority, as mayor and commonalty, deans and chapters, colleges, and such like; for as they have a power to take lands and tenements, so they ought to have care to defend them, and they and their successors ought to make their entry and their claims to avoid fines, as other persons and their heirs ought to do; but if a bishop, dean, parson, vicar, or prebendary, or such like, do not make their entry or claim, or bring their actions to avoid the fine within 5 years, but are remiss through all this time, yet their successors shall not be bound for ever, inasmuch as they have no absolute estate or authority*

authority in their possessions; for the bishop and dean, cannot do things to bind their possessions without having the assent of the dean, and chapter, and the parson, vicar, and others &c. without the assent of the patron and ordinary, who have an interest and part in the matter, and though every successor shall have 5 years to make his claim or entry, yet every one who suffers the 5 years to pass shall be bound during his time, but though he is bound, his successor shall have other 5 years to make his entry or claim, or bring his action. Plow. Com. 538. a. b. Trin. 20 Eliz. Croft v. Howell.

(L) *What Things shall go in Succession.*

[294]

Fol. 515.

[1. **R**EGULARLY, *no chattel shall go in succession in case of a sole corporation.* Co. Lit. 46. b. Coke 4. Fulwood 65.]

Unless where the is a custom for it; as in the Case

of the Chamberlain of London, who is made by custom, and the same custom which has created him, and made him a corporation in succession as to the special purpose concerning orphanage has enabled the successor to take such obligations, recognizances &c. as are made to the predecessor, and the executors &c. of the chamberlain ought not to intermeddle with them, they being by the said custom taken in his corporate, and not in his private capacity; but bishops, parsons, &c. have no such custom to take chattels in their politic or corporate capacity. 4 Rep. 65. a. Hill. 33 Eliz. Fulwood's Case. — Cro. E. (464 bis) pl. 16. Pasch. 38 Eliz. B. R. Bird v. Willford the S. P. as to the Chamberlain of London held accordingly, by Gawdy and Fenner, (Popham and Clench absentibus) and judgment nisi, which was afterwards affirmed, and at the end of the case is a note, that in Mich. 43 & 44 Eliz. B. R. WILFORD v. RUTTON, debt was brought on such a recognizance made to the predecessor, alledging the custom of London for the chamberlain to take obligations or recognizance to them and their successors for orphans portions; and after judgment for the plaintiff, error was brought thereof in the Exchequer-Chamber, where the judgment was affirmed. — A succession of *chattels* in one person will not be presumed except in case of an *abbot*, or *prior*, or the like corporations known in law to rest in one person, as well for chattels as inheritances; for otherwise bishops, deans, parsons, vicars &c. cannot take obligation to them and their successors but they will go to their executors. Hob. 64. in pl. 65.

[2. If a *lease for years* be made to a *bishop and his successors*, and the bishop dies, this shall not go to his successors, but to his executors. Co. Lit. 46. b.]

His executors shall have it en auter droit. Co. Lit. 46. b.

[3. If a *master of an house that hath a covent and common seal recovers in an annuity*, and after *arrearages incur*, and after he dies, the successor master shall have the arrearages, and not the executor of the predecessor, because the predecessor could not make a testament. 19 H. 6. 44. b. adjudged.]

[4. But if a *parson recovers an annuity, and after arrearages incur*, and after the *parson dies*, the executor of the parson shall have the arrearages, and not the successor, because he could make a testament. 19 H. 6. 44. b.]

See tit. Successors (C) pl. 8. and the notes there.

[5. The patent confirmed by act of parliament is, that offenders in practising physick in London without admision by the College of Physicians, shall forfeit 5l. for every month, unum dimidium regi & alterum dimidium dicto presidenti and collegio; if the president of the college recovers in debt against an offender, and dies, the successor shall have a *scire facias* to execute it, and not the executor, for the predecessor recovered it as due to him

Cro. J. 159. pl. 13. S. C. & S. P. held accordingly. — Nov. 112. S. C. adjudged accordingly per tot. Cur. — Browal.

93. S. C.
but not ad-
judged.

Br. Chattels,
pl. 4. cites
S. C. —
Br. Scire
Facias, pl.
106. cites
S. C.

But Ibid.
Marg. cites
Mich. 41 &
92. Elia. C.
B. an obli-

[295]
gation was
made to the
Bishop of
Bath and
Wells and
his succefs-
ors, and
adjudged,
that the fucceffors cannot have action of debt thereupon; but they agreed, that the fucceffor might have covenant upon a leafe for years, which is in the realty. The doubt was, becaufe after the death of fuch perfon who is a corporation fingle, the obligation is due to no body, and fo fufpended, & actio perfonalis once fufpended moritur &c. But nulla regula, quin fallit.

him and the college. P. 5 Ja. B. R. between *Atkins and Gardiner*, adjudged.]

6. The ornaments of the chapel of a preceeding bifhop belong to the fucceeding bifhop, though other chattels in cafe of a fole corporation do belong to the executors of the party deceased, and fhall not go in fucceffion; per Coke Ch. J. 12 Rep. 105. cites 21 E. 4. 48.

7. A man was obliged to a dean in 20l. *folvend eidem decano & fuccefforibus fuis*; the dean died; Shelley held that the fucceffor fhall have it, for the dean has a corporation to him and his fucceffors, as well as to him and his heirs or executors; fo of a bifhop, abbot, or prior, if the fucceffors are named in the obligation his executors fhall not have it; *contra of a mayor, or the guardians of a church*, and their fucceffors; Baldwin held, the payment to the dean and fucceffors was void, becaufe the obligation was to the dean only. D. 48. a. pl. 15. Trin. 32 H. 8. Anon.

8. When a bifhop makes an eftate, leafe, grant of a rent-charge, warranty, or any other act which may tend to the diminution of the revenues of the bifhop &c. which fhould maintain the fucceffor, the deprivation or translation of the bifhop is all one with his death; but where the bifhop is patron and ordinary, and confirmeth a leafe made by the parfon without the dean and chapter, and after the parfon dies, and the bifhop collates another, and then is translated, yet his confirmation remains good, for the revenues that are to maintain the fucceffor are not thereby diminished; the like diverfity holds in cafe of *refignation*. Co. Litt. 329. a.

9. The ancient jewels of the crown are heir looms, and fhall defcend to the next fucceffor, and are not devisable by teftament. Co. Litt. 18. b.

The king
cannot dif-
pofe of
them by
teftament,
but he may
give them by letters patents; per Berkely and Jones. Cro. C. 344. pl. 8. Hill. 9 Car. B. R.

per Berkely and Jones. Cro. C. 344. pl. 8. Hill. 9

(M) Election and Amotion of Officers, Members &c. At what Time; And How.

1: MEMORANDUM, that at the parliament held by adjournment H. 38 H. 8. it was admitted by writ of the king, and fo accepted, that if one burgef be made mayor of a vill, that has judicial jurisdiction, and another is fick, that thofe are fufficient caufes to elect new ones, by which they did fo by writ of the king out of Chancery, comprehending this

this matter which was admitted, and accepted in communione parliamenti. Br. Parliament, pl. 7. cites 38 H. 8.

2. Where a city, borough, or vill is incorporated by charters, some by one name, and some by another, and it is directed in the charter that the mayor, bailiffs, aldermen &c. shall be chosen by the commonalty or burgeses, there being in every charter a power to make laws, ordinances, and constitutions for the better government of the cities &c. they *may by their common consent ordain that the mayor or bailiffs, or other principal officers, shall be chosen by a certain selected number of the principal of the burgeses, or of the commonalty, and prescribe also how such a select number shall be chosen*; and though in some corporations such constitutions cannot be known or found, where the usage of electing hath been in a particular number, yet it shall be presumed that there were such anciently, 4 Rep. 77. b. 78. Mich. 40 & 41 Eliz. The Case of Corporations.

3. Upon a *quo warranto* against the town of Liskardy in Car. 2d's time, they surrendered their charter, which was not enrolled till King James the 2d, who in consideration of the surrender, granted a new charter to them. It was held per Cur. that the second charter being in consideration of a void surrender, was also void, and where by the charter surrendered *none could be mayor, if he were not a capital burges*, and one was made a capital burges by the charter of King James, and after made mayor according to the old charter. Question was started whether he were a legal mayor? Holt and Cur. said, you should first have moved him from being a capital burges, for if we find one in actual possession of an office, we shall intend him to be *rightful officer* till the contrary appears; as if mere laicus be presented &c. to a benefice; we shall take him for a clerk till first steps be annulled, 12 Mod. 253. Mich. 10 W. 3. Piper v. Dennis. [296]

4. Note, by their charter they are *impowered to proceed to an election on such a day*; and per Holt and Turton, if they do not chuse on that day, they cannot do it the next day; for they must pursue their patent, and that gives power only for one day, and though the mayor be sick, so as he cannot officiate that day, there is no remedy; and Turton said, that in such a case they were *forced to petition*, in Case of Corporation of Norwich; and they said, they had known a *quo warranto* go against the corporation for *chusing at another day*; but Wright, then king's serjeant, and since lord keeper, was strong against this opinion. 12 Mod. 308. Mich. 11 W. 3. in Case of The King v. Borough of Abingdon.

5. At an election of mayor *an unqualified person has the most votes*; afterwards they proceed to a *new election*, and a third person, who is qualified, has the majority; this third person is the mayor duly elected, and not he that had most votes next to the unqualified person. 8 Mod. 37. Hill. 7 Geo. 1. The King v. the Mayor of Bedford.

But if one unqualified is elected a common council man

&c. with others that are qualified it is void as to him only. 8 Mod. 36. Hill. 7 Geo. the King v. the Mayor of Bedford.

* S. P. Arg. 8 Mod. 36. Hill. 7. Geo. in Case of the King v. the Mayor &c. of Bedford.

6. Where the *election* is to be by 26 burgesses, and 1 *burgess* is *unqualified*, the election is void. Arg. 8 Mod. 36. Hill. 7 Geo. The King v. the Mayor of Bedford.

7. Where by the charter of incorporation the *election* is to be on a certain day, it *cannot be made on a day after in that year, unless upon the death or removal of the mayor in being*; for if they should elect on any other day, it is not secundum authoritatem given by the charter; and there can be no inconvenience if they should stay till another day appointed by the charter for them to chuse a new mayor; because (by this charter) it is expressly provided, that the mayor elected shall continue in his office till another is duly chosen, which cannot be but upon the very day appointed; for where they have no power by their charter to chuse on any other day, their *corporation shall be dissolved rather than they should make an election on another day*, and this Court cannot compel them to chuse a mayor on any other day, where there is a mayor already in being; per Cur. 8 Mod. 129. Pasch. 9 Geo. 1. B. R. The King v. the Mayor and Burgesses of Tregenny.

The like was granted against C. the Mayor of Tregenny;

and on the day the writ was returnable the sheriff brought him in, and he was committed to the King's Bench till the court should consider what fine to set on him; and a rule was made, that he should be carried down to Tregenny at the next election-day for a mayor, in order to proceed to an election, which was done; and upon a mandamus directed to him for that purpose, he returned that T. S. was duly elected mayor, and that he was willing to swear him into that office; but he having misbehaved himself in this election, there being no more than [297] two who voted for the new mayor, who therefore refused to be sworn, least he likewise should be prosecuted upon an information for usurping the office; so that C. continued mayor still, having been mayor, though he was six months in prison; and for this misbehaviour he was found guilty, and fined 200*l.* and to stand committed till he paid it. 8 Mod. 285, 286. Trin. 10 Geo. The King v. Cracker.

9. Although a *charter directs that the aldermen shall be elected annually*, yet such clause is only directory, and the office of alderman is not thereby determined at the end of the year after his election, but the person elected continues alderman till dead, or removed in the same manner as a person elected into the office of mayor. MSS. Tab. March 16. 1725. Prose v. Foot, upon a Writ of Error.

10. *Charter that the old mayor shall continue till another was duly elected and sworn*; another is duly elected, yet he cannot act as mayor till sworn, and judgment in quo warranto against such mayor. MS. Tab. March 1725. Pender v. the King in Error.

Every election ought to be without any surprise, fraud,

11. All the members of a corporation are invited to drink a glass of wine at a tavern; after their being met, one of the body resigns his office, and then they go immediately to an election. On a trial at Bar the jury found it a good election, but the Court

Court thought it against evidence; and granted a new trial. This was on return to a mandamus, and after a peremptory mandamus granted. Court said, this was a surprise, there being no notice of a vacancy and a fraud, and that body circumvented; though Ch. J. said, that he thought, *if all the members were together, and all concurred in election*, or did any other corporate act; that would be good, though no previous notice; but Fortescue doubted; for the body ought to be corporaliter congregat. et affemblat. this thing is not proper at an ale-house, but at Guildhall, that is a proper place for all business; many inconveniences would be if these things were allowed, but no inconvenience where the proceedings is free and open, which ought to be in all cases. The members ought to have time to consider who is a proper person to be chosen in. Pasch. 10 Geo. The Case of Appleby.

or circumvention, coram Raymond Ch. J. at Lancaster 1723. The case of Penryn in Cornwall.

12. The major part of the common council cannot elect a member at a meeting of the corporation summoned for another purpose. 2 Lord Raym. Rep: 1355. Pasch. 10 Geo. 1. Machel v. Nevinfon.

13. An election of a member by the other members of a corporation not corporately assembled, must be assented to by every one. 2 Lord Raym. 1359. Pasch. 10 Geo. 1. Musgrave v. Nevinfon.

(N) Election. By Virtue of a new Charter.

1. **A**N information shews that the city of Norwich is an ancient city, and that Hen: 4. by his charter, granted *that the mayor, aldermen, and citizens, might elect two to be sheriffs of the said city*, and that after this, Charles 2d, in the 18th year of his reign, by his charter, granted *that the mayor and aldermen might elect one sheriff, and the citizens another*. The mayor, aldermen and citizens, having the election of the sheriff in them, they might by consent alter the manner of the election, and their acceptance of the charter of Car. 2. and having elected according to the form prescribed in it, is an evidence of such consent, and therefore though the charter of the king may not alter the manner vested and settled by the charter of Hen: 4. yet if they accept such a charter, and consent to it, and act in conformity to it, and acquiesce under it, such charter is good, and this submission and conformity shall be an evidence of their consent, and therefore the election is good. Skin. 574: 576: Hill. 6 W. 3: B.R: The King v. Larwood;

1 Salk. 167. pl. 1. S. C. & S. P. Comb. 315. 316. S. C. & S. P.

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(O) Pleadings by or against Officers, as to their Election &c.

1. **TRESPASS** upon the 5 R. 2. the defendant said, that his predecessor, master of the hospital of D. was seized, and died, and he entered as master, and gave colour, and held no plea; because he did not shew the foundation, and that he was elected, and made master, quod nota; by which he amended his plea, and said, that it is the hospital of St. John, incorporated of brothers and sisters time out of mind, and that they used, after the death of every master, that the brothers and sisters should chuse another master, and that J. late master was seized, and died, and that this same defendant, before the entry &c. was elected master by the brothers and sisters, and entered &c. as above, and well, without expressing the number of brothers and sisters; for the corporation was made before time of memory, and peradventure does not express the number. Br. Action sur le Statute, pl. 9. cites 34 H. 6. 27.

2. But if the number be expressed in the foundation, there he ought to express it; quod fuit concessum. Ibid.

(O. 2) Property of Goods of Corporations. In whom it shall be said to be; And Pleadings.

1. **DURING** the life of the abbot, the property is in the abbot only, and he may give them; But if he dies, or be deposed, the property is in the house. Br. Abbe, pl. 2. cites 9 H. 6. 25.

2. When a count or pleading is made, which speaks of an abbot who is dead or removed, it shall be called goods of the late abbot, but when it is of an abbot who is alive, or in possession, it shall be entered goods of the abbot only; note a difference. Br. Abbe, pl. 2. cites 9 H. 6. 25.

(P) Actions by or against them. What, and How; And where any Members are liable in their private Capacity.

1. **A**N abbot being parson imparsoned of a church appropriated, had *juris utrum* of the glebe land of this church. Thel. Dig. 19. Lib. 1. cap. 22. f. 5. cites Hill. 8 E. 3. 473.

[299] 2. Note, per Thorp, that *trespass* does not lie against commonalty, but shall be brought against the persons by their proper names; for *capias* nor *exigent* lies not against commonalty. Br. Trespass, pl. 239. cites 22 Aff. 67.

3. *Capias*

3. *Copies in debt* shall not be awarded against corporation; for the body politick cannot be taken; per Choke Justice. Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

4. The *abbot* shall have *all manner of actions touching the rights, titles, interests, properties and possessions of their abbies*. Thel. Dig. 19. Lib. 1. cap. 22. f. 4.

5. *Money was borrowed by the Company of Woodmongers, who were incorporated, and a bond was sealed with their common seal, and subscribed by the defendants, who were two of the principal of the company. The bond was noverint universi &c. Nos magistrum & guardianos &c. of the Company of Woodmongers teneri &c. and now the company being dissolved, action was brought against those who subscribed the bond; but ruled, that it could not lie; so the plaintiff was nonsuit.* Lev. 237. Pasch. 20 Car. 2. B. R. Edmonds v. Brown. & al.

6. *A member of a company sets his name to a bond under the common seal of the company; this does not legally bind him in his private capacity.* Arg. Fin. R. 84. Hill. 25 Car. 2. in Case of Naylor v. Brown late Master of the Woodmongers Company & al.

7. *A. lends 500l. to a company, who gives bond under their common seal for re-payment with interest; afterwards the company assigned a bond of 1000l. due to them to J. S. for payment of some of their debts, and J. S. declared the trust of 620l. part for several members of the said company, who were paid accordingly; but decreed re-payment by the said members, and that A. be first paid with damages and costs; and the Court was of opinion, that the declaration of the trust by a stranger (as J. S. was) as to the 620l. was utterly void, because the corporation did not join in declaring the trust, or give J. S. any authority under their common seal, or by any corporate act to make such a declaration.* Fin. R. 83. Hill. 25 Car. 2. Naylor v. Brown, late Master of the Woodmongers Company & al. Members of the said Company.

8. *For a duty or charge upon a corporation, every particular member thereof is not liable, but process ought to go in their publick capacity.* Nota, sic dictum fuit. 1 Vent. 351. Mich. 32 Car. 2. B. R.

(Q) **Actions. Names.** By what Names they shall sue, or be sued.

1. **THE** *unction to be master of an hospital* is a dignity, and he ought to be sued by such name, otherwise the writ shall abate; per Scrope. Thel. Dig. 35. Lib. 3. cap. 3. f. 4. cites Hill. 2 E. 3. 48.

2. But *provest* is not a name of dignity. Thel. Dig. 35. Lib. 3. cap. 3. f. 4. cites Hill. 17 E. 3. Nomen Dignit. 6.

3. A man may sue an abbot or prior by name of *Abbas Sanctæ Trinitat. de M.* or *Beatæ Mariæ Eborum*, or *Prior Sancti Oswaldi &c.* without saying *monasterii*, or *domus talis sancti*, or such like. Thel. Dig. 50. Lib. 6. cap. 3. f. 5. cites Mich. 3 E. 3. 109.

[300] 4. And against the Abbot of Dorchester, without saying *Abbatii Ecclesiæ Beatæ Mariæ de Dorchester*. Thel. Dig. 50. Lib. 6. cap. 3. f. 5. Trin. 10 E. 3. 516.

5. In *action real* the writ may well be brought against an abbot, without naming him by name of baptism. Thel. Dig. 49. Lib. 6. cap. 2. f. 2. cites Trin. 7 E. 3. 324. 10 H. 6. 1. and 12 H. 4. 5.

6. But in writ of entry against an abbot, the abbot by whom the entry is supposed ought to be named by his name of baptism. Thel. Dig. 49. Lib. 6. cap. 2. f. 2. cites Trin. 7 E. 3. 324. 10 H. 6. 1. and 12 H. 4. 5.

Thel. Dig.
175. Lib.
11. cap. 54.
f. 24. cites
S. C.

7. [But] *replevin* lies against an abbot without naming him by name of baptism. Thel. Dig. 49. Lib. 6. cap. 2. f. 2. cites Trin. 7 E. 3. 334.

8. So of a writ of *debt*. Thel. Dig. 49. Lib. 6. cap. 2. f. 2. cites Trin. 18 E. 3. 24.

9. But in *trespass contra pacem* against an abbot he shall be named by his name of baptism. Thel. Dig. 49. Lib. 6. cap. 2. f. 3. cites Mich. 8 E. 3. 427. but says the contrary is held Patch. 39 E. 3. 17.

10. Assise against the Abbot of Selby, and did not say of what saint the abbey is, and good, because they are known by this name, and so see that action by a corporation is good by name known. Br. Corporations, pl. 40. cites 8 Ass. 24.

11. An abbot may sue writ of *trespass* without naming himself by his name of baptism. Thel. Dig. 34. Lib. 3. cap. 1. f. 3. cites Mich. 8 E. 3. 427.

12. So he may sue *scire facias* to have execution out of a judgment without naming himself by his name of baptism. Thel. Dig. 34. Lib. 3. cap. 1. f. 3. cites Pasch. 29 E. 3. 44.

13. A writ brought by an abbot by name of *The Abbatis Beatæ Mariæ Eborum* was adjudged good, without saying *Abbot of the Church of our Lady of York &c.* Thel. Dig. 37. Lib. 3. cap. 9. f. 1. cites Mich. 8 E. 3. 436. and 8 Ass. 44. and Hill. 3 H. 6. 28. and 5 E. 4. 20.

14. Writ was maintained against a corporation by name of *Præpositori Scholarium Domus Beatæ Mariæ de Oxon.* without saying *Præpositor. Scolaibus &c.* Thel. Dig. 53. Lib. 6. cap. 12. f. 1. cites Trin. 22 E. 3. 9.

15. *Trespass* does not lie against a corporation, viz. by the name of corporation, but against the persons who did it by their proper names; for *capias* nor exigent does not lie against commonalty, nor commonalty shall not plead nor be impleaded but with the mayor or bailiffs, if they have mayor or bailiffs, and corporation may be by name of commonalty without mayor, bailiff,

Thel. Dig.
20 Lib. 1.
cap. 22.
f. 13.
cites S. C.
and says,
see 2 H. 9.
6. and 3
H. 6. 43.

bailiff, or other head. Br. Corporations, pl. 43. cites 22 Aff. 67. per Thorp.

16. The writ was *Præcipe Priori de Wigorn*; and the defendant said, that there is in Worcester the Prior of the Freres Preachers, and the Prior de Nostre Dame &c. by which the writ abated. Thel. Dig. 53. Lib. 6. cap. 12. f. 2. cites Mich. * 25 E. 3. 48. notwithstanding that the demandant tendered that the defendant was known by such name. Concordat. 29 Aff. 70. But none but the prior pleaded in assise.

* 10 Rep. 126. a. cites S. C. and Lord Coke says, that therefore it seems to him reasonable a multo fortiori to

inforce every one that would avoid a writing, demise, grant &c. made by, or to a corporation, by reason of any verbal or literal misnomer, to shew that there are two corporations within the same city, borough, or vill &c. viz. One by the true name, and the other by such name as is contained in the deed &c. and so to leave the deed &c. good by or to one of them; but when in truth there is but one and the same corporation, demises, grants &c. made by them, or to them, ought not to be avoided by such high and verbal variances, when, in substance the true name of the corporation, whether by matter expressed, or necessarily implied within the words themselves, appears to the court.

17. A writ of annuity was maintained against an abbot [301] without naming him by name of baptism. Thel. Dig. 50. Lib. 6. cap. 2. f. 5. cites Trin. 31 E. 3. Brief 342.

18. So of writ of *ejectment of ward*. Thel. Dig. 50. Lib. 6. cap. 2. f. 5. cites Mich. 22 E. 3. 17. where it was said, that in a *pone per vadi*. he ought to name him by his name of baptism.

19. Notwithstanding that land be given to an abbot by name of baptism, and to his successors *ad inveniend. Cantar.* &c. yet the writ of *cessavit* lies against him by name of Abbot, without naming him by his name of baptism. Thel. Dig. 50. Lib. 6. cap. 3. f. 2. cites Pasch. 32 E. 3. Brief 291.

20. Writ brought by the king against one by name of *Provost of the House of C.* was abated, because the corporation by the grant and licence of the king was founded and named *Provost of the Chancery of G.* Thel. Dig. 53. Lib. 6. cap. 12. f. 3. cites Trin. 38 E. 3. 17.

21. In writ brought against the *Priores of Newark* in Dorchester, it was said, that such writ is maintainable with alleging that it is known by such name, if charter of the king of foundation, or any other thing of record be not shewn to the contrary; and upon this the charter of foundation was shewn forth, by which the king had granted land to found a college of sisters in the prechors of Dorchester, by which the writ abated for the *surplusage of Newark*. Thel. Dig. 53. Lib. 6. cap. 12. f. 4. cites Mich. 38 E. 3. 33.

22. Scire facias was sued against the *Prior of Saint John's of Hierusalem* in England upon a recovery in waste, which was *Prior of the Hospital of Saint John's of Jerusalem* in England, and exception taken; per Thorp, it is known by the one name and the other, and therefore answer; quod nota. Br. Misnomer, pl. 15. cites 44 E. 3. 16.

23. Every corporation may sue by its very name of foundation, notwithstanding that it be not known by this name, but better known

known by another name, as the Master of the Scholars of the Hall of *Valens Maria* in Cambridge, brought writ by this name of his foundation where it was better known by the name of *Pembroke-Hall*. Thel. Dig. 37. Lib. 3. cap. 9. f. 2. cites Mich. 44 E. 3. 35. Brief 582.

24. *Dean and chapter* cannot maintain writ, if the dean be not named by his name of baptism. Thel. Dig. 34. Lib. 3. cap. 1. f. 4. cites Mich. 14 H. 4. 11. but cites 21 E. 4. 19. contra.

25. Where a prior had brought writ of entry, upon disseisin, made to himself of land of which he was seised in his own right, exception was taken that he had not named himself by his name of baptism and surname; quære. Thel. Dig. 34. Lib. 3. cap. 1. f. 5. cites Mich. 9 H. 5. 9.

26. In writ of covenant by the Abbot of W. against the Commonalty of S. it was agreed, that where a corporation is by name of commonalty, and after by another grant they have bailiffs, yet by this change they shall not be discharged of covenants, annuities &c. to which they were bound before. Br. Corporations, pl. 3. cites 2 H. 6. 9.

27. *Præcipe* quod reddat against *Magistrum* five *Custodem* & *Presbyteros Collegii* de A. was awarded good, though it was five, which is disjunctive, because the foundation was by those words. Br. Corporations, pl. 3. cites 7 H. 6. 13.

28. An abbot shall have writ of false imprisonment, or battery, or other trespass done to his person without naming him, or by name of baptism. Thel. Dig. 34. Lib. 3. cap. 1. f. 6. cites Pasch. 7 H. 6. 29.

[302] 29. It was held, that in plea personal where process of outlawry lies against an abbot or prior, he ought to be named by his name of baptism. Thel. Dig. 50. Lib. 6. cap. 2. f. 7. cites Mich. 10 H. 6. 1. and says, see 18 E. 4. 21.

30. Where a man is obliged by name of Mayor of London, being mayor, and after is removed, the writ ought to be brought against him by his proper name. Thel. Dig. 50. Lib. 6. cap. 2. f. 8. cites 14 H. 6. 21.

31. The *Dean and Canons of Windsor* is a good name of corporation to bring action by writ, without shewing how they are founded by this name. Thel. Dig. Lib. 3. cap. 9. f. 7. cites Trin. 18 H. 6. 16.

32. Where the name of the corporation was bailiffs and commonalty, the writ brought against them by the name of such a one and such a one nuper bailiffs and the commonalty is abateable. Thel. Dig. 53. Lib. 6. cap. 12. f. 9. cites Mich. 20 H. 6. 9.

33. In writ of trespass to be brought against an abbot, it suffices to name him by the name by which he is known; but where franktenement is demanded against him, which is of the right of his house, he ought to be named by his very name of foundation. Thel. Dig. 54. Lib. 6. cap. 12. f. 10. cites Pasch. 20 H. 6. 9. and Mich. 21 H. 6. 4. where the writ was maintained by saying that he was known by the one name, and by the other.

ther, without saying that he and his predecessors have been known by the one and the other &c.

34. *In trespass against an abbot* it is sufficient to name him by name known, but in writ against him, which touches the frank-tenement, he shall be named by his name of foundation; per Newton for law, quod non negatur. Br. Corporations, pl. 5. cites 20 H. 6. 27. and M. 21 H. 6. 4.

35. Misnomer of corporation in trespass against him of his own act is no plea if it be named by a name known. Br. Misnomer, pl. 31. cites 21 H. 6. 4.

36. *Contra in action* brought by the corporation, or in action against them of right of the house, and known by the one and by the other name, there it is a good plea in trespass against the abbot; quod nota. Ibid.

S. P. agreed clearly for law. Br. Misnomer, pl. 85. cites 16 H. 7. 1.

37. Writ was brought against the Mayor and Commonalty of Exeter, and it was pleaded, that they were incorporated by name of mayor, two bailiffs, and commonalty, time out of mind, and held no plea, without saying further, that they had been impleaded by such name by such time, and not by the name of mayor and commonalty without the bailiffs &c. and then the plea shall be good. Thel. Dig. 54. Lib. 6. cap. 12. f. 12. cites Trin. 26 H. 6. Brief 101.

38. Writ brought against a prior by name of Prior of the Church of St. Peter of B. is not good, where his right name is Prior of the Church of Saint Peter and Paul of B. Thel. Dig. 54. Lib. 6. cap. 12. f. 13. cites Mich. 35 H. 6. 5.

39. In writ of entry brought against such a one Warden of the House of M. in Oxford, it was pleaded, that the name of the corporation was Warden and the Scholars of the House &c. and so was founded, and by such name had purchased and impleaded, and been impleaded time out of mind &c. It was held, that the writ could not be maintained by saying that they had impleaded and been impleaded by the one name and by the other, because the corporation cannot be tenant of the land unless according to their very name &c. For the warden only is not tenant, and so it shall be of dean and chapter, but it may be otherwise in personal action. Thel. Dig. 54. Lib. 6. cap. 12. f. 14. cites Trin. 36 H. 6. 485.

40. Where an obligation was made *Th. Abbati Monasterii beate Mariæ extra Muros civitatis Eborum*, it was held by the Court that writ upon this obligation, by name of *Abbatis Monasterii beate Mariæ Eborum* should be good. Thel. Dig. 38. Lib. 3. cap. 9. f. 11. cites Pasch. 5 E. 4. 20. and says, See Trin. 11 E. 4. 2.

41. The Master of Burton Sancti Lazari was received to maintain his writ in such form, viz. that he, and all his predecessors, time out of mind, were named and known, and have impleaded, and were impleaded as well by the one name as by the other. Thel. Dig. 38. Lib. 3. cap. 9. f. 9. cites Trin. 9 E. 4. 21. and says, See Hill. 13 H. 7. 14. per Keeble, and Mich. 16 H. 7. 1. agreeing.

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42. In

42. In writ upon *contract* or of *trespass against corporations* if the defendant *pleads misnomer* the plaintiff may say that known by the one name and the other; but such plea is not good in writ brought upon *specialty*, where the name varies from the *specialty*. Thel. Dig. 54. Lib. 6. cap. 12. f. 16. cites Trin. 11 E. 4. 2. 11 H. 6. 38. 63. and says, See 1 E. 4. 7. Pasch. 5 E. 4. 20. Mich. 16 H. 7. 1.

43. *Mayor and commonalty may sue without naming the mayor by his name of baptism*, as it seems. Thel. Dig. 38. Lib. 3. cap. 9. f. 10. cites Trin. 12 E. 4. 10.

44. Where a corporation is *master and confreres*, and are sued by the name of *Master and Confreres five Socii*, this five Socii is void. Br. Corporations, pl. 8. cites 20 E. 4. 12.

45. A corporation may be *incorporated by one name and impleaded by another name by grant of the king*. Thel. Dig. 38. Lib. 3. cap. 9. f. 12. cites Trin. 11 H. 7. 27. 21 E. 4. 70.

46. If the king grants to a corporation to purchase or give by name of *Master and Wardens, Brothers and Sisters*, and by this grants to them to implead and be impleaded by name of *Master and Wardens*, all is good, and shall be used accordingly, the one in perquisites and the other in suits. Br. Corporations, pl. 95. cites 11 H. 7. 27.

47. If there be a corporation of one sole person that hath a *fee simple*, and may have a writ of right, he may be named in originals &c. by the common law by his *christian name*, without any surname; for the name of his corporation is in lieu of his *firname* (some say both christian name and surname) as John Abbot of D. &c. John Bishop of N. but otherwise it is of a *parson*; for he must be named by his *christian name and surname*. 2 Inst. 666.

Gilb. Hist. of C. B. 188. cites S. C. and says that the reason is, because in this case the death of the individual is a good plea in abatement.

For a new successor comes in his place, who was not party to the former writ. —Gilb. New Abr. 504. cites S. C. and for the same reason in totidem verba.

Gilb. Hist. of C. B. cites S. C. for bodies aggregate are immortal and invariable, and therefore the parties to the first writ are always the same. —Gilb. New. Abr. 504. cites S. C. and gives the same reason in totidem verba.

48. If it be a corporation aggregate of many able persons, as mayor and commonalty, dean and chapter, master of an hospital and confreres &c. the mayor, dean, or master, need not to be named by his *christian name*, because that such a corporation standeth in lieu both of the christian name and surname. 2 Inst. 666.

49. A corporation as a mayor and commonalty cannot *disfranchise* in their own persons, but by their bailiff. Brownl. 175. Master and Fellows of Emmanuel College in Cambridge's Case.

50. An action lies against the members of a corporation by their private names for a false return to a *mandamus* directed to the corporation by their corporate names. Per Cur, Comyns's Rep.

And Holt Ch. J. said, it had been so held in

Rep. 86. pl. 55. Trin. 12 W. 3. B. R. The King v. the Corporation of Rippon. an action for a false return to a mandamus directed to the corporation of Canterbury. Ibid.

51. Some have held, that when a *politick person* is impleaded to name him by the name of his *politick capacity*, is sufficient, and that this will serve instead of christian or surname, because he is not to be distinguished from natural persons, since as a natural person he is not impleaded, but it is enough to distinguish him from all other corporations. Gilb. Hist. of C. B. 188. [304]

52. A corporation was instituted by the name of *Præfetti & Guardianorum Naueporum de Rederiffe*, and an action is brought against them by the name of *Præfetti Guardiani and Socii*, and accounted bad. Gilb. Hist. of C. B. 189. 2 Bull. 233. Pasch. 12 Jac. Tipling v. Pexall, S. C. — New Abr. 503. S. in totidem verbis.

(R) Actions by or against a Corporation, and one of the Corporation.

1. THE opinion of Brian Ch. J. was, that the *mayer and commonalty* should have action for the imprisonment of their *mayer*. Thel. Dig. 20. Lib. 1. cap. 22. f. 14. cites Mich. 21 E. 4. 14. & 15.

2. It was said by Wavisor, that the *Mayor and Commonalty* of Newcastle were bound to the *mayer* by his proper name, and afterwards the next year, when another was made *mayer*, he brought action of debt upon this obligation, and took nothing, because this obligation was void, made to himself by himself. Thel. Dig. 20. Lib. 1. cap. 22. f. 14. cites Mich. 21 E. 4. 14 & 15.

3. It was said by Brian, that if one be indebted to an *abbot*, and after makes himself a monk in the same abbey, and at last is made *abbot* of the same house, he shall have action of debt against his own executors for this debt. Thel. Dig. 20. Lib. 1. cap. 22. f. 15. cites Pasch. 5 H. 7. 26. [b. 26. a.] Br. Abbe and prior, pl. 13. cites 3 H. 7. 11. and 5 H. 7. 24 per Rede, to which Townsend agreed.

(S) Actions &c. Inter se.

1. THE chapter of the church of our Lady of Lincoln, brought *quare impedit* against the dean of the same church. Thel. Dig. 19. Lib. 1. cap. 22. f. 11. cites Trin. 9 E. 3. 458.

2. If *mayer and commonalty* disseise one of the *commonalty*, he shall have *assise* against them; for they are as several persons; viz. body *politick* and body *natural*; per Paston. Br. Corporations, pl. 24. cites 8 H. 6. 1. 14.

3. And Mich. 17 E. 3. 64. the same chapter had such writ against their said dean, and so had action of their possession severed

covered from the dean. Thel. Dig. 19. Lib. 1. cap. 22. f. 12. cites Hill. 21 E. 4. 21.

*(T) Joinder in Actions. In what Cases.

1. **T**HE Dean and Chapter of Canterbury being guardian of the spiritualities, shall join in writ of trespass of goods out of their possession taken which come to their hands as ordinary sede vacante. Thel. Dig. 32. Lib. 2. cap. 11. f. 10. cites Mich. 17 E. 2. Brief 822.

2. The corporation of Southampton, and other natural persons, were received to sue jointly in the Exchequer for disturbance made in the taking of custom and toll &c. and of battery done to the hailiff. Thel. Dig. 31. Lib. 2. cap. 9. f. 1. cites Trin. 2 E. 3. 51.

3. A writ of account brought by one named Rich. T. & Socor. Suor. de Societate Parochie de Florencia &c. was abated, because his companions were not named. Thel. Dig. 21. Lib. 1. cap. 22. f. 30. Pasch. 5 E. 3. Fol. 182. Br. 716.

4. The master of the hospital of Saint John of Cant. brought writ of right of advowson of a church, which his predecessor held in proprias usus in right of his hospital, without naming his confreres with him. Thel. Dig. 19. Lib. 1. cap. 22. f. 9. cites Pasch. 5 E. 3. 189.

5. In trespass of battery by an abbot and his commoign, the writ was ad damnum ipsorum, and held good. Thel. Dig. 115. Lib. 10. cap. 25. f. 2. cites Pasch. 13 E. 3. Briefs 261.

6. And such a writ by a prior and his confrere ad damnum ipsius Prioris was adjudged good. Thel. Dig. 115. Lib. 10. cap. 15. f. 2. cites Hill. 22 E. 3. 2.

7. The dean and chapter ought to join in all actions, which touch their possessions, which they have in common appurtenant to their entire corporation. Thel. Dig. 31. Lib. 2. cap. 7. f. 1. cites 17 E. 3. 64. and 21 E. 4. 25. and 14 H. 4. 11. and Trin. 1 H. 5. 5.

8. It was adjudged, that the Prior of the house of Leepers of Plympton should have assise in his own name, inasmuch as he was Prior of the house by election of confreres of the same house, and that they have been Priors of the same house by election by the manner time out of mind, where in fact the Prior was a layman, and his confreres lay persons who had not any foundation, nor common seal, nor rule &c. Thel. Dig. 19. Lib. 1. cap. 22. f. 66. cites 44 Aff. 9.

9. The Mayor and Commonalty of Lincoln brought writ of covenant against the Bailiffs and Commonalty of Derby, upon a covenant by those of Derby, that those of Lincoln should be quit of murage, postage, custom and toll, within the vill of Derby &c. where some Burgesses of Derby had taken certain toll and custom of certain Burgesses of Lincoln, and adjudged a good writ, notwithstanding that exception was taken that the corporation

poration ought not to have action, but the single persons whose goods were taken ought to have action of trespass against the persons who took them. Thel. Dig. 20. Lib. 1. cap. 22 f. 21. cite Trin. 48 E. 3. 17.

10. No *covent* was party to any action or record, but the head of such spiritual corporation did implead and was impleaded always without the covent. Thel. Dig. 19. Lib. 1. cap. 22. f. 7. cites 14 H. 4. 10. Mich. 14 E. 4. Abbe 4. and 15 E. 4. 2. 5 H. 7. 26. and 7 H. 7. 9.

11. Note, that a *covent shall not be named with the abbot or Prior* in any suit by him to be taken, neither shall they be named with the abbot in any suit to be taken against the abbot or prior, or with him. Br. Abbe, pl. 14. cites 5 E. 4. 122.

12. The *master of a college* brought writ without his *confreres*. Thel. Dig. 19. Lib. 1. cap. 22. f. 10. cites Trin. 11 E. 4. 4. [306]

13. It was held for law, that a *warden and chaplains of a chantery* should have an action of *trespass for breaking their close*, against one who had a lease of the same close of the same warden alone without the chaplains, and should punish him for the trespass. Thel. Dig. 20. Lib. 1. cap. 22. f. 18. cites 21 E. 4. 75. and that so agrees Trin. 1 E. 5. 5. and 7 H. 7. 9.

14. Grant in a corporation which touches every single person, there every single person shall have thereof advantage by himself; as grant to be quit of toll &c. per Catesby. Br. Corporations, pl. 65. 21 E. 4. 55. 56.

15. If an obligation be made to one B. and to an abbot, if B. dies now, his executors and the abbot shall join in action of debt. Thel. Dig. 32. Lib. 2. cap. 11. f. 9. cites F. N. B. tit. Writ de debito.

16. Trespass for entering into the close of the dean; after verdict found for the plaintiffs, it was moved in arrest of judgment, that this action being brought for the possessions of the dean only, the chapter was not to join, and for this cause judgment was staid. Cro. E. 200. pl. 23. Mich. 32. 33 Eliz. in B. R. Wolley v. Robinson.

(U) Appearance of Corporations to Actions brought against them. How it must be.

1. **I**N writ against the dean and chapter, the chapter cannot appear nor plead any plea without the dean, notwithstanding that the dean be dead. Thel. Dig. 194. Lib. 13. cap. 4. f. 1. cites Hill. 7 E. 3. 302.

2. And in writ against master and scholars, the master cannot appear nor plead without the scholars. Thel. Dig. 194. Lib. 13. cap. 4. f. 1. cites Trin. 34 H. 6. 49. but adds quære if the head of a corporation can appear in proper person.

3. Debt; præcipe the society of Lumbards London Merchants of Florence, and two Lumbards came and named their names, and said

B. Trespass
pl. 135.
cites S. C.

said that they were distrained by the sheriffs of London, and returned in issues 10l. and prayed that their appearance be recorded as Lumbards of London to save their issues, but not as of the society of Lumbards of London, sed non allocatur; for the writ shall be intended to be against a corporation. Br. Corporation, pl. 28. cites 19 H. 6. 80.

* S. P. Br. Corporation, pl. 63. cites 21 E. 4. 7. 12. 27. 67. per Brian and tot. Cur.

4. And where mayor and commonalty are sued, and he and all the commoners appear in proper person, this is not good, for it is another body, therefore it seems that the corporation ought to appear * by attorney, by their name of corporation, and not in proper person. Br. Ibid.

They cannot appear but by attorney by deed under their common seal, and otherwise the warrant is void, per Choke J. quod non negatur, therefore quare of the usage thereof at this day. Ibid.

5. Mayor of commonalty cannot appear in person; for the court cannot tell if all appear or no, and therefore they ought to make attorney. Br. Garrant de Attorney: pl. 36. cites 21 E. 4. 13.

[307] 6. In a *quo warranto* brought against the bailiffs, aldermen &c. they did appear by warrant of attorney, and one of the bailiffs named in the warrant did not appear, nor agree to it; it was holden by the whole Court, that the appearance of the mayor or greater part being recorded was sufficient; and it was also holden per Curiam, that although the warrant of attorney was under another seal than their common seal, yet being under seal, and recorded, it cannot be annulled. Godb. 439. pl. 506. The Bailiffs &c. of Yarmouth v. Cowper.

(X) Abatement of Writ.

1. **I**N covenant by the Mayor and Commonalty of Lincoln against the Mayor, Bailiffs, and Commonalty of Derby, the writ was general, according to the deed, that the defendants had covenanted with the plaintiffs &c. And the deed was, that the Mayor and Commonalty of Lincoln should be quit of murage, pontage, custom, and toll within the Vile of Derby, of all merchandises &c. The count recited the covenant according to the deed, but at the end of the count it was shewn, that some certain singular persons of Derby took toll &c. of certain burghesses of Lincoln, contrary to the covenant &c. yet adjudged a good writ. Thel. Dig. 84. Lib. 9. cap. 5. f. 26. cites Trin. 48 E. 3. 17. and says, See 30 E. 3. 20.

Thel. Dig. 272. Lib. 11. cap. 58. f. 6. cites B. C.

2. In trespass upon the case against the master of an hospital, the writ was, that where the defendant by reason of his tenure ought to cleanse a ditch ipseque et omnes alii prædictam tenuram prius habentes, præd. fossam reparare et mundare debuerunt et consueverunt de temps dount &c. And it was abated for want of good title; for such prescription is not good, for it should be in the defendant.

ant and his predecessors, or in them and those whose estate &c. Thel. Dig. 106. Lib. 10. cap. 14. f. 16. cites Mich. 12 H. 4. 7.

3. One by name of *Chaplain of the Chantery of T.* was received to maintain writ of entry, *without saying* in his writ *that the chantery was in any church or chapel.* Thel. Dig. 37. Lib. 3. cap. 9. f. 3. cites Pasch. 12 H. 4. 19.

4. *Scire facias* upon recognizance of 100l. in the Exchequer against *J. Abbot of R.* the sheriff returned him warned, and came *R. Abbot of P.* and said that *J. Abbot* was and is deposed long before the writ and he is *Abbot*, & non allocatur. For he has no day in court, and also he is at no mischief, for if execution be made of his goods he may have trespass, by which judgment was given against *J. Abbot.* Br. Misnomer, pl. 2. cites 2 H. 6. 5.

5. Where a recovery was had upon composition in writ of covenant against the Commonalty of *Shrewsbury*, and afterwards the king makes bailiffs there, a writ of *scire facias* was sued out of this recovery by name of the commonalty, leaving out the bailiffs, and it was held per Cheney, that the writ was good, but Hankford held the contrary, and that the bailiffs ought to be named. Thel. Dig. 54. Lib. 6. cap. 12. f. 7, 8. cites Trin. 2 H. 6. 9. and says, that Fitzh. abridges the opinion of Hank. to be the best, Brief 7.

6. It was held by Martin, that writ brought brought by an abbeys by name of *Abbatissæ Minorissarum de B.* is not good, without saying *Abbatissæ Domus Minorissarum &c.* Thel. Dig. 37. Lib. 3. cap. 9. f. 4. cites Hill. 3 H. 6. 28.

7. But it was held, that a writ brought by name of *John* [308] *Abbot of Glastenbury* should be good without saying *Abbot of the Church of our Lady of Glastenbury.* Thel. Dig. 37. Lib. 3. cap. 9. f. 4. cites Pasch. 4 E. 4. fol. 8.

8. If a prior brings 2 writs, the one by name of the Prior of *St. A. of B.* and the other by name of the Prior of *St. A. near B.* the one of the writs ought to abate. Thel. Dig. 38. Lib. 3. cap. 9. f. 6. cites 15 H. 6. Brief 74.

9. It was said by Newton, that an abbot ought to bring his writ by his very name of foundation. Thel. Dig. 37. Lib. 3. cap. 9. f. 5. cites Mich. 21 H. 6. 4. and that so it was held Mich. 1 E. 4. 7. where he is plaintiff, that he cannot say, *that he is known by the one name, and by the other, or by diverse names.* But adds *quære*, if he may maintain his writ by saying *that he and his predecessors have used time out of mind to implead by diverse names*, and says, See Trin. 9 E. 4. 21.

10. The writ was against *Præpositum & Scholares Ecclesiæ Beatæ Mariæ & Sancti Michaelis in Canterbury*, where their name was to be impleaded by grant of the king *Præpositum & Scholares &c. de Canterbury*; Videlicet, (in) put in lieu of (de.) And it was held, that the writ should abate, and should not be amended. Thel. Dig. 54. Lib. 6. cap. 12. f. 17. cites Mich. 15 E. 4. 17.

11. In debt it was agreed, that of mayor and commonalty it is no plea that the mayor is *not of sound memory*, nor *excommunication* in the mayor is no plea in action by the mayor and commonalty, and *outlawry*, or *villeinage* in the mayor is no plea. Br. Nonabilitie, 37. cites 21 E. 4. 12. 13. 67. 69.

12. *Action brought by the Dean and Chapter of W.* the defendant said, that the *dean died the day of the writ purchased*; judgment of the writ; and per tot. Cur. if the dean dies, and *another is chosen dean before the day in court*, and the *first dean not named by his proper name*, but named dean, the writ is good. Br. Corporations, pl. 64. cites 21 E. 4. 15.

13. *Otherwise it shall be if no dean was at the day in court* when the defendant pleaded. Br. *ibid.*

14. *And it was said clearly, that if the dean had been named by the name of baptism*, and died, pending the writ, there the writ shall abate, though another was elected before the day in court. Br. *ibid.*

15. If *mayor and commonalty bring action*, outlawry was pleaded in the mayor, judgment if he shall be answered it is no-plea; for the action is brought by corporation, and the outlawry is against him in his natural body. Br. Nonabilitie, pl. 53. cites 21 E. 4. 14.

16. *In action by a corporation or natural body misnomer* of the one or the other goes but to the writ, but to say that *no such person in rerum natura, or no such body politick*, this is in bar; for if he be misnamed, he may have a new writ by the right name, but if there be no such body politick, or such person, then he cannot have action. Br. Misnomer, pl. 73. cites 22 E. 4. 34.

17. A *corporation distrained in their proper names*, and therein replevin brought the writ was adjudged naught; for a corporation as mayor and commonalty *cannot distrain* in their own persons, but by their bailiff. Brownl. 175. Trin. 13 Jac. The Master and Fellows of Emanuel College in Cambridge,

[309] (Y) Abatement of Writ. For Variance.

1. **I**N debt, the writ was *Præcipe, W. W. Prior of the House of the St. Mary, and St. Thomas the Martyr De novo Locis juxta Gylford in the county of Surry*, and the obligation was, *we R. A. Prior of the Priory Novi Loci juxta Guilford in the County of Surry, and Covent of the same place*. Pole demanded judgment of the writ for the variance; for it should be *Priory* according to the obligation, and *not House*; but per Prisot, all is of one effect, and the writ shall be according to their foundation; but Pole said, yet it ought to accord with an *alias dictus*; but per Prisot, this need not be, for the successor nor the plaintiff are not estopped, and therefore answer; quod nota, that *variance in name of a corporation* shall not lose the obligation, *if it be of one and the same effect*. Br. Variance, pl. 80. cites 28 H. 6. 8.

2. In *trespass by the Mayor and Bailiffs of Oxford*, the defendant said, that they are *incorporated by name of the Mayor and Burgeses* of Oxford &c. and not &c. and held a good plea, per Brian; but Wood was of opinion, that it is *not good without shewing letters of the incorporation*. Thel. Dig. 124. Lib. 11. cap. 5. s. 3. cites Hill. 13 H. 7. 14.

(Z) Things done to, or by the Head, or any Members of a Corporation. In what Cases it shall be said done in the Politick or in their Natural Capacities.

1. IF I give 20l. to an abbot to pray for the soul of my father, he has this money in his own right, and not in right of the house, and if he wastes it, the ordinary cannot depose him for this cause. Br. Deposition, pl. 4. cites 9 E. 4. 34. Per Moyle J.

2. A corporation cannot be beaten in their corporate but in their natural body; nor a corporation cannot beat another, nor do treason or felony in their corporation, and corporation shall not be imprisoned for denying their deed, nor for disseisin with force &c. nor forejure the realm. Br. Corporation, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

3. If a mayor is imprisoned touching his office, as for a bond made by him and the commonalty, this is an imprisonment to him as mayor. Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

4. And where the corporation ought to chuse a mayor annually such a day under pain of 10l. and the mayor is imprisoned, so that they cannot observe the day, by which they lose the penalty, or if they ought annually to appear in the Exchequer such a day to account to the king, under pain of 10l. and the mayor is imprisoned, so that he cannot observe the day, by which they lose the 10l. the corporation shall have action of this imprisonment, and so the plea good. Br. *ibid*.

5. Durefs cannot be to a body politick, but it may be to a mayor to do a thing appertaining to his office; by the best opinion; for he is the head of the corporation. Imprisonment of the head of a natural body in the pillory is imprisonment of all the body; for it is entire. Br. Durefs, pl. 18. cites 21 E. 4. 8. 14. 15.

(A. a) Things done by the Head without the [310] Body's joining. In what Cases they shall stand good.

1. IF an abbot or prior levies a fine of land of the right of the house, this shall bind them for ever. Br. Abbe, pl. 21. cites 46 E. 3. 13.

Jenk. 162,
163. pl. 9.
cites S. C.
and says,
the mayor
and com-
monalty are
one indivi-
sible body;
the mayor,
as mayor, can do nothing regularly, for he is the head of the corporation aggregate, and is only a part of it; but usage and precedents are not to be neglected in things indifferent, or which are not mala in se.

2. The sum of 100*l.* per ann. is due to the Mayor and Commonalty of Southampton out of the king's customs. Acquittance by the mayor only is not good, by all the Justices; and yet because he is the head of the corporation, and there were 100 precedents shewn of the like matter in time passed, therefore the acquittance of the mayor was allowed; quod nota. Br. Corporations, pl. 87. cites 2 R. 3. 7.

(B. a) Process against Corporations.

Br. Corporations, pl. 30. cites S. C.

1. *DEBT* was brought against the Society of Lombard Merchants of Florence, and the Sheriff distrained 2 Lombards, who came in person, and prayed their appearance to be recorded to save their issues as distinct persons, but not as of the Society of Lombards, & ideo non allocatur, but that they shall be put to their remedy against the Sheriff of London, by a general action of trespass; for where a corporation is impleaded, they ought not to distrain any private person; quod nota. Br. Trespass, pl. 135. cites 19 H. 6. 80.

Ld. North said, he did not see how a company that had no estate could be compelled to appear; upon which it was urged, that the plaintiff might take out a *distringas* against the company, and have it returned nihil, and so get a *sequestration* against them, and then by the course of the court the plaintiff need not bring them to a hear-
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ing. Vern. 122. Hill. 1682. in Case of Cur-

2. Upon a dismissal of a bill in Chancery, and that dismissal enrolled, an appeal was to the Lords, setting forth, that in the ordinary course of proceedings the Chancery could not relieve the plaintiff against the defendants, they being a company, and served with process would not appear, they *having nothing to be distrained by*. The defendants being so many of the members of the company as were particularly named, did put in an answer, plea, and demurrer, and the company, though often summoned, did not appear. Their Lordships ordered, that the dismissal stand reversed, and that the Lord Chancellor &c. retain the bill, and that the Court of Chancery shall issue forth usual process of that court, and if cause be, process of *distringas* thereupon against the said corporation, provided the said process be served one month before the return thereof; and if upon return of the said process the said corporation shall not file an appearance, or shall appear and not answer, the said bill shall be taken *pro confesso*, and a decree shall thereupon pass. But in case the said corporation shall appear and answer within the time aforesaid, then the Court of Chancery shall proceed to examine what the plaintiff's just debt is, and shall decree the said company to pay so much money as the same shall appear to amount unto, with reasonable damages. And in case the corporation shall not pay the sum decreed within 90 days after the service of the said decree upon their governor, deputy-governor, treasurer, clerk, or secretary for the time being, then the Lord Chancellor, or Lord Keeper for the time being, shall order and decree, that the governor, or deputy-governor, and the 24 assistants of the said company, or

or so many of them as by the tenor of their charter do constitute a quorum for the making of levations upon the trade or members of the said company, shall within such time, as by the Lord Chancellor or Keeper shall be thought fit, make such a *leviation upon every member* of the said company as is to be contributory to the publick charge, as shall be *sufficient to satisfy the said sum to be decreed* to the plaintiff in that cause, and to collect and levy the same, and to pay it over to the plaintiff as the Court shall direct; and such a leviation is to be put in writing, and signed with the hand of the governor, deputy-governor, and assistants of the aforesaid company for the time being, and so many of them, as by the constitution of the said charter, do make a quorum, shall not make or return such levations as aforesaid, the Lord Chancellor, or Lord Keeper, may issue *process of contempt* against them, as is usual against persons in their natural capacity; and if by the said time so to be limited by the said Court of Chancery, the said *money so to be assessed*, shall *not be paid*, then, and from thenceforth, every person of the said company upon whom such a leviation shall be made to be liable in his capacity to pay his quota or proportion assessed; and the Lord Chancellor, or Lord Keeper, is to order or decree, that such process shall issue against any such member so refusing or *delaying to pay his quota* or proportion, as is usual against persons charged by the decree of the said Court for any duty in their several capacities; and if the total so returned and filed with the register, shall not amount to so much as shall be sufficient to satisfy the sum decreed, with respect had to such persons as shall make it appear that they are overcharged, or ought not to be charged at all, then the said Lord Chancellor, or Lord Keeper for the time being, may from time to time order that a *new leviation* be made and returned into the registers of the Court of Chancery, of such sum as shall be sufficient *by way of supplement* for that purpose, to the payment whereof *every individual person is to be bound* in such manner as aforesaid. Chan. Cases 206, 207, Trin. 23 Car. 2. Dr. Salmon v. the Hamborough Company.

son v. the African Company. — S. C. & S. P. cited a Vern. 396. in Case of Harvey v. African Company.

3. An *attachment* will not lie against a corporation. 3 Keb. 230. pl. 8. Mich. 26 Car. 2. B. R. in Case of Morgan v. the Corporation of Carmarthen.

4. *After a decree against a corporation for a sum of money, and a distringas issued against them*, Lord North was of opinion, that execution was to go without their being further heard; as in the case of a judgment at law. 2 Vern. 395. Mich. 1700. Harvey v. the East-India Company.

After service of a writ of execution of a decree against a corporation, the next process is a *distringas*, and after that a *sequestration*.

5. *But the distringas in process against a corporation is to answer as well the contempt as the bill or complaint, but when upon a decree, it is ad comparendum & solvendum, and the Court refused to grant any stay of process, or for the defendants to be examined.* 2 Vern. 396. Mich. 1700. Har-

which being once awarded, they can never after come and pray to enter their

appearance, as they might have done on the distringas, which issues for that very purpose, to compel them to appear; but the appearing being past, the process must go on, because the appearance being only in favour of liberty, can be of no service to a corporation which cannot be committed. Chan. Prec. 128. pl. 115. Mich. 1700 Harvey v. East-India Company.

vey v. the East India Comp.—And Lord North said, that a sequestration issued on the return of the first distringas 24 Car. 2. in the Case of Dr. Hufsey v. the Grocer's Company. And also in the Case of Cholmley v. the Grocer's Company.

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(C. a) Pleadings and Proceedings.

1. **I**N annuity it was held, that if an *abbot with assent of the covent grants an annuity without naming himself by name of baptism*, that in action against his successor he ought to surmise in the count the name of him who was abbot at the time of the grant. Thel. Dig. 84. Lib. 9. cap. 5. f. 24. cites 20 E. 3. Annuity 33. and that so agrees 12 H. 4. 5.

2. Where there is a *covenant between two wills incorporated, that the one shall suffer the other to be quit of toll*, and after their common officer takes toll, this is a breach of the covenant; contra if it be done by another particular person. Br. Corporation, pl. 74. cites 48 E. 3. 17.

3. *Annuity was granted to J. M. by a corporation, by name of Provost of the College of C. and action was brought by name as above, without name of baptism*, and good. But per Hull, he ought to declare the name of the grantor in his count. Br. Corporations, pl. 18. cites 12 H. 4. 5.

4. *So if abbot with the assent of the covent is bound to me in 20l. without other name*, I shall have action against the successor, and declare the name of the obligor certain in the count. Br. Corporations, pl. 18. cites 12 H. 4. 5.

5. *So in writ of entry sur disseisin made to the predecessor*, the name of the disseisee shall be expressed in the writ; per Thirn. Br. Ibid.

6. *Scire facias against the Commonalty of S. who said that the king had made bailiffs there*; judgment of the writ, not naming the bailiffs, and a good plea. Br. Brief, pl. 493. cites 2 H. 6. 9.

7. *Writ of waste by an abbot shall be ad exarcedationem domus*. Br. Abbe, pl. 2. cites 9 H. 6. 25.

8. *In debt against an abbot upon the deed of his predecessor, because the predecessor pledged a tablet of the said late abbot, and his abbey aforesaid, to the plaintiff for 40l. of which the predecessor re-paid 20l. and he delivered to him the tablet again, and took the obligation of the predecessor himself, and averred that the tablet came to the use of the house, and the count good by judgment, notwithstanding that he said goods of the abbot and abbey*; for when this is counted or pleaded of an abbot who is dead, the count shall be ut supra, and the pleading in like manner

manner; but if it be of an abbot who is abbot, and alive, it shall be goods of the abbot only; for during his life the property is in him, and after his death the property is in the house; quod nota diversify; and per Rolfe, count shall not abate for *jurplusage*. Br. Count, pl. 10. cites 9 H. 6. 25.

9. The Dean and Canons of Windsor sued writ of trespass, and the writ was *ad respondendum decano & canonicis &c. without shewing how they were so incorporated*. Thel. Dig. 20. Lib. 1. cap. 22. f. 16. cites Trin. 18 H. 6. 16.

10. Debt against an abbot, and counted that T. late abbot, predecessor &c. promised to him 10l. of which 5l. was for bread and beer, and 5l. for defence of a suit which was pending against the abbot; and the count good, notwithstanding he did not say that the bread and beer came to the use of the house, nor that the suit was against the abbot; for this shall be intended; but by all the Justices, the best count was to say generally, that it came to the use of the house; and after the count was awarded good. Br. Abbe, pl. 9. cites 22 H. 6. 56.

11. *Scire facias against L. B. Warden of the College of C. in Canterbury, and the scholars of the same*, were sued by the successor of a parson upon recovery of an annuity, and was brought in the county of Norfolk, and the sheriff returned *quod scire feci L. B. and scholaribus &c.* and upon this L. B. came, and said that he is the same person who was warned, and said that he is not warden, nor was not the day of the writ purchased, nor ever after; judgment of the writ; and there it is agreed, that the scholars need not appear nor plead, for all is one corporation; and if the head be not warned, the body is not warned; and the issue was accepted. But per Moyle, this is a strange issue, for L. B. said, that he is not master; per Wangford, if the issue be found for the plaintiff, he shall have judgment to recover the annuity; but Brook makes a quære thereof, for the scholars who are part of the corporation, are not parties; but if the issue be found for the defendant, it seems clear that the writ shall abate, for he is named L. B. warden in the writ, and therefore it seems it had been better for the plaintiff to have sued his writ against the warden and scholars &c. without proper name of the master, and then *scire feci magistro & scholaribus* returned had been good. Br. Corporations, pl. 6. cites 34 H. 6. 14. 49.

12. Where the number of brothers and sisters appear in the foundation, this shall be shewn certain in the pleading, and the dying seised of the predecessor is good cause to enter, and justify upon the 5 R. 2. *Ubi ingressus non datur per legem*. Br. Corporations, pl. 7. cites 34 H. 6. 27.

13. But this is no title in affize, and he ought, where the master dies, to shew how the other was elected, and made master &c. before he entered, and that tunc intravit &c. Br. Ibid.

14. Annuity by the Dean and Chapter of Stoke against the master of the hospital of Saint Mary-Overs, Parson of D. Thel. Dig. 23. Lib. 1. cap. 22. and

and counted of 10l. arrears of an annuity of 40s. and that *J. late dean of the said chapter, and then chapter, predecessors of the now dean and chapter, were seised of the said annuity by the hands of one H. late parson of the church aforesaid, predecessor &c. and that the aforesaid late dean and chapter, and all his predecessors, were seised &c. by the hands of the aforesaid H. late parson of the church aforesaid, and by the hands of his predecessors, parsons of the church aforesaid time out of mind, until the 26th year of the now king, and the aforesaid late dean died, and the aforesaid now plaintiff was elected, and made dean of the church aforesaid &c. and alledged seisin at S. aforesaid, to the damage &c.* Choke demanded judgment of the count, because he counted that the dean and chapter which now are, and the late dean and chapter then predecessors &c. where the *chapter cannot have predecessors nor successors, for it is perpetual, so that the dean may have predecessor, but not the chapter; & non allocatur; for they are incorporated by this name, and therefore they ought to prescribe by the name by which they are incorporated, and the prescription was awarded good, that the dean and chapter, and their predecessors, time out of mind, were seised &c. notwithstanding that they did not say (then dean and chapter) of the church aforesaid, for it shall be intended that their predecessors were deans, Br. Prescription, pl. 42. cites 39 H. 6. 13.*

15. *So of a prior, and this ex parte of him who makes the prescription, or claims by the prescription. Ibid.*

16. *But otherwise it is of him who shall be bound by the prescription, as here it is to bind the parson, that they were seised by the hands of the rector, his predecessor &c. they shall say, then parsons or rectors of the church aforesaid &c. for they are to be bound &c. Ibid.*

[314] 17. In replevin it was said by all the justices, except Prisot, that the *abbot is none of the covent*, and this is well proved by Moile, by the writ of fine assensu Capituli, and Ashton ad idem; for *in a deed supposed by the abbot and covent, it is a good plea that Not the deed of the abbot*, not denying that it is the deed of the covent; and it is a good plea, that *Not the deed of the covent*, not denying that it is the deed of the abbot, and therefore the abbot is not parcel of the covent; but per Prisot, the abbot is part of the covent, and the head or principal of the covent. Br. Abbe, pl. 12, cites 39 H. 6. 36. and 50.

18. *The Abbot of Colchester, parson of a church, claimed an annuity as pertaining to the said rectory; he ought to prescribe in right of the rectory, and not that he and his predecessors, abbots, have had it time out of mind; because of parcels and things pertaining to the rectory they ought to claim in right of the rectory. Pl. C. 503. b. cites 49 H. 6. 16.*

19. *One of the commonalty cannot justify for rent due to the commonalty, but the corporation itself shall justify, and no single person of them. Br. Corporations, pl. 54. cites 7 E. 4. 14.*

20. In *trespass* the defendant pleads *lease* for years of the master and confreres of a college, and the lease was *sigilla nostra apposuimus* instead of saying the common seal, and yet held good, and it shall be intended their common seal. Br. Faits, pl. 70. cites 11 E. 4. 4.

21. *Debt upon arrear of account by the Mayor and Commonalty* of S. against the executor of T. P. their receiver, and counted that auditors were assigned by the aforesaid mayor and commonalty; Catesby said one T. is now mayor, and was the day of the writ purchased, which T. and the commonalty, did not assign auditors, and no plea, though they did not *shew who was mayor at the time of the assignment*; for if the predecessor assigned &c. yet the successor and the commonalty shall have action, and count generally that the mayor and commonalty &c. notwithstanding these words *aforesaid, mayor, and commonalty*, and that the count above was good, and is the common course, which has all times continued, and if the mayor dies, pending the writ, and another is chosen, yet the writ, as above, remains good. Br. Corporations, pl. 56. cites 12 E. 4. 9. 10.

22. *So of dean and chapter*, because those actions by custom have been used for all the body. Br. Ibid.

23. *Contra of abbot or prior*, for those actions are by the head of the body only. Br. Ibid.

24. In *trespass* the defendant justified, because the freehold was in the dean and chapter, and he, as servant, and by their command, entered, and exception was taken, because he did not *shew the name of the dean*, viz. the proper name. Le. 307. Arg. cites* 13 E. 4. 8.

* Br. Corporations, pl. 58 cites S. C. that in a particular patent made to the mayor,

aldermen, and commonalty, it was held, that a man in pleading shall shew who was mayor at the time of the grant, but not who were aldermen and commonalty; but Choke J. said, that though it is usual to shew who was mayor at the time &c. for the better certainty, yet he had known it adjudged when such patent had been pleaded generally, it had been awarded good; because it shall be taken that there was a mayor at the time of the grant; but if there was no mayor the grant was void. — Br. Pleadings pl. 161. cites S. C.

25. If dean and chapter make a *lease* thus, viz. *Sciatis nos decanum & capitulum &c. dimisisse &c.* and does not *shew the proper name of the dean*, the lease is void; per Littleton, quod fuit concessum per curiam. Br. Corporations, pl. 59. cites 18 E. 4. 8.

Br. Leases, pl. 45. cites S. C. and 13 E. 4. that by the best opinion where the dean and

chapter make a lease &c. it is not necessary to express the dean's name of baptism, — Le. 307. Arg. cites S. C.

26. And the law is the same where he justifies by command. — [315]
ment. Br. Ibid.

27. *Debt by R. Alderman of the Guild of St. Mary in Boston* against L. upon a bond made to S. N. late alderman, which was to him and his successors; per Littleton justice he ought to shew how the corporation was made; contra of abbot and prior, or dean and chapter, but guild or fraternity cannot be made but

by a special incorporation, and per Brian it is true, for *successor cannot take effect but there is succession*, for otherwise this word successor is void. Br. Corporations, pl. 60. cites 20 E. 4. 2.

28. *For where a man is bound to the church-wardens and their successors, this word successor is void*, and the executors shall have the action, for the wardens are not incorporated; per Brian and Littleton Justices to the same purpose, that a *bond made to the Dean of P. and his successors* is not good to the successors, but the executors shall have the action; *contra* of bond to the *Dean and Chapter of P. and their successors*, there the successor shall have the action after the death of the predecessor. Br. Corporations, pl. 60. cites 20 E. 4. 2.

29. *So of a bishop*; per Littleton Justice, and Choke Justice to the same purpose, and agreed the Case by Brian, and that *bond made to the abbot or prior, and their successors, omitting the covent*, is good to the successor; for *no other of the corporation is able to take the bond but the abbot*. Br. Corporations, pl. 60. cites 20 E. 4. 2.

30. *And that where chantry priest is founded by such name and successors, and land is given to him and his successors*, this is good, and the successor shall have it, and not the heir. Br. Corporations, pl. 60. cites 20 E. 4. 2.

31. *But bond made to him and his successors shall enure to the executors and not to the successors*, by which the plaintiff prayed leave to purchase a better writ. Br. Corporations, pl. 60. cites 20 E. 4. 2.

32. *Debt upon a bond by the Abbot of Saint Bennet's against the Mayor, Sheriffs, and Commonalty of Norwich; the defendant said, that A. the abbot, and others of his covent, imprisoned J. H. then mayor, in the Fleet in London, till he and the sheriffs, and the commonalty, made the bond at Norwich by the dures of afore-said*, and the best opinion was, that the plea was good. Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

33. *And after, fol. 27. they were compelled to shew that there was mayor and his name, and the name of the sheriffs, the time of the deed, and the name of the abbot &c.* Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

34. *But it was held by several, that if he had said that so many men make the commonalty, chapter, or covent, who were imprisoned to make the deed*, this is good; for otherwise it cannot be intended that a corporation can be imprisoned; and where the mayor is imprisoned, the corporation shall not have false imprisonment. But per Catesby the plea is good; for the body is entire, and therefore the imprisonment of the mayor is the imprisonment of all the corporation, for he who *restrains my hands*, imprisons all my body; so where *one holds my feet in the stocks* or *my head in the pillory*, without authority, this is an imprisonment to all the body. Br. Corporations, pl. 63. cites 21 E. 4. 7. 12. 27. 67.

35. In action brought by any corporation pretended or supposed, it is a good plea to say that there is not any such corporation by name &c. in the same county. Thel. Dig. 20. Lib. 1. cap. 22. f. 19. cites Mich. 22 E. 4. 37.

36. *Trespass against the mayor and commonalty*; it is no plea [316] that the inhabitants of the same will have common there, for this is another corporation. Br. Corporations, pl. 48. cites 4 H. 7. 13.

37. In *trespass brought by a dean and chapter*, being parson *imperfonae* of the church of D. this diversity was taken, viz. that if they demand the whole church of D. they shall say that they were seised in *dominico suo ut de feodo in jure ecclesie cathedralis sue predictae &c.* but if the demand be of parcel only, as of an acre, parcel of the parsonage; they ought to say in jure ecclesie sue de D. Pl. C. 493. 503. b. Mich. 18 & 19 Eliz. in Case of Grendon v. the Bishop of Lincoln.

38. Notice may be given to a corporation by their solicitor and counsel; per Manwood. Savil. 20. pl. 50. Pasch. 24 Eliz. Anon.

39. If a parson pleads that he is seised, he shall say in jure ecclesie, for he has two capacities, and without such words he shall be intended seised in his own right; but if an abbot pleads that he was seised, there needs not such words, for he has no other capacity; so of dean and chapter, mayor and commonalty; per Anderson Ch. J. Le. 153. pl. 212. Trin. 31 Eliz. C. B. in Case of the Scholars of All-Souls in Oxford v. Tamworth. And. 27a. pl. 280. S. C. but S. P. does not appear. — 4 Le. 178. pl. 277. S. C. in totidem verbis.

40. In *ejectment* the plaintiff declared of a lease by the Warden and Fellows of All-Souls College. Exception was taken, because the plaintiff had not declared upon a lease by the warden and fellows, without naming any name of the warden. The whole Court held the declaration well enough, and Anderson said it stands with reason, that since the college was incorporated by the name of Warden and Fellows, and not by any christian name, that they may purchase and lease by such name without any christian name, and may be impleaded and implead others by such name, and as the fellows, in such case, need not be named by their christian names, no more ought the warden; but otherwise of a parson, vicar, chauntry priest. Le. 306. pl. 427. Mich. 32 & 33 Eliz. C. B. Carter v. Claycole.

41. A writ of right was brought by the Warden and College of All-Souls College in Oxford, and the writ was *quod clamat esse jus & hereditatem suam*, but did not say in jure collegii; yet adjudged good; for when the writ was brought by the custos & collegium, it cannot be otherwise intended than in jure collegii, as in their incorporation; for they had no other capacity, and the precedents are both ways. Cro. Eliz. 232. pl. 1. Pasch. 33 Eliz. C. B. All-Souls College v. Tamworth. Le. 153. pl. 212. Trin. 31 Eliz. S. C. and the writ awarded good. — 4 Le. 178. pl. 277. S. C. in totidem verbis. And.

— And. 272. pl. 280. S. C. and the writ adjudged good, and cites 10 H. 7. fol. 5. a good case to their purpose.

42. Pleading *quod Villa de Beverly incorporata fuit* was good enough, although that it be *better pleading to say that the mayor, burgeses &c. or the inhabitants were incorporate &c.* Noy. 54. Fisher v. Truflow.

Adjudged
that they
may grant
or lease by

43. In pleading a lease by a dean and chapter the name of the dean must be shewed. Co. Litt. 3. a.

name of dean and chapter, without *showing their proper names*, and so may plead and be impleaded, because in their corporate capacity they have no name of baptism, or any other name than that by which they are incorporated; but it is otherwise in the case of a parson or a vicar; for they must use their name of baptism. 3 Salk. 103. pl. 5. Mich. 8 W. 3. Newton v. Travers.

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44. An abbot, prior, bishop, dean, parson, or any other sole corporation that is *seised in autre droit*, cannot disclaim when he is *vouched, by reason of homage ancestrel, or in any other case*, for they alone cannot divest any thing in fee which was vested in their church or house. Co. Litt. 102. b. 103. a.

45. If a prior, bishop &c. in a *quo warranto* against them for franchises and liberties, *disclaim*, this shall bind their successor. Co. Litt. 103. a.

46. If an abbot &c. *acknowledges the action* in a writ of annuity, this will bind the successor, because he cannot falsify it in an higher action, and there must be an end of suits; but if the abbot *levy a fine, or acknowledge the action in a præcipe quod reddat*, the successor shall be bound *pro tempore*, but he may have a writ of right, and recover the land; but if in debt upon a bond against an abbot &c. the abbot &c. *confesses the action*, and dies, the successor shall not avoid execution, though the bond was made without assent of the convent, for he cannot falsify the recovery in an higher action; so it is of a statute or recognizance. Co. Litt. 103. a.

S. C. cited
2 Saund.

305.
Roll. Rep.

404. pl.

33. S. C.

but S. P.

does not

appear.—

3 Bullst.

211. S. C.

but S. P. does not appear.

47. In debt for rent by a corporation, they *intitle themselves by feoffment*, and do *shew livery to be executed by letter of attorney*; and therefore it was objected, that they cannot take unless by letter of attorney; fed non allocatur; for all *necessary circumstances shall be intended* to be executed, as well as in a feoffment made to other persons; and judgment accordingly. Cro. J. 411. pl. 11. Mich. 14 Jac. B. R. Ipswich (Bailiffs &c.) v. Martin & al.

48. *Ejectment-lease* was made by a corporation; they sealed the lease and *delivered it by their attorney*, having a letter of attorney from them to deliver the same; per Cur. they cannot do this in any other manner but by their attorney; they are only to subscribe and seal the lease, and to deliver the same by their attorney, having their letter of attorney so to do. Bullst. 119. Pasch. 9 Jac. St. John's Coll. Oxon. v. Lord Norris. alf. Clark v. Hannes.

49. No action lies at common law against a dean and chapter on a *promise made by them*; because a corporation cannot be bound *without deed*, and when a corporation is *sued* in a court of equity, the corporation itself is not sued, but *some particular persons* of the corporation, and one may be sued that was not of the corporation at the time of the promise, and where the promise was to make a new lease on the surrender of the former, and they grant a new lease to another, it was resolved, that the old lessee had great equity to be relieved. Roll, R. 82. pl. 28, Mich, 12 Jac. B. R. Freevill v. Ewebank.

50. In debt by the guardians and fellows of N. for a forfeiture on breach of a bye-law, Hobart Ch. J. that they need not *shew how they were incorporated*; for the name argues a corporation, Hob. 211. Pasch. 14 Jac, in Case of Norris v. Stapes.

51. A corporation may have some things by prescription, and some by charter, and therefore may use both titles. Nota, Lat. 113. Hill. 1 Car.

52. A lease was pleaded to be made by dean and chapter, but did not shew that the dean and chapter were seised in jure collegii, nor what estate the dean and chapter had in the land; Doderidge held the pleading ill, because it might be of an estate per auter vie. Lat. 14. Pasch. 2 Car. Newman v. Marsh.

53. In covenant brought against a bishop on a covenant entered into by his predecessor, it was not alledged that he was seised in jure episcopatus, and therefore was adjudged ill; for in pleading seisin in all sole corporations it ought to be pleaded in quo jure they were seised; but it is otherwise in corporations aggregate. 2 Lev. 68. Mich. 24 Car. 2. B. R. Davenant v. the Bishop of Salisbury.

that it implied seisin in right of the bishoprick, which is true if it were a corporation capable only in his politick capacity, or as abbot &c. but in regard he might also be seised in his natural capacity, the declaration for this cause was held to be ill.

Lat. 121.
Wood and
Newman v.
Marsh,
S. C. the
court held
the plead-
ing ill.

Vent. 223.
S. C. and
Hale Ch. J.
said the old
books were,
that where
it is pleaded
that J. S.
episcopus
was seised,

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54. In second deliverance, the defendants made *consuſance as bailiffs to the Master and Governors of Christi's Hospital &c.* for that they are a corporation, and seised in fee of the place where, in the right of the hospital; upon demurrer it was objected, that the consuſance was ill, because it did not set forth *How incorporated, nor say per eorum præceptum, nor shew any writing*; but adjudged that this avowry is good, because the incorporation is but an inducement to the alleging the seisin in them, therefore need not be shewn, nor need he allege any precept in writing. 3 Lev. 107. Mich. Car. 2. C. B. Manby v. Long.

55. A bill was brought against a corporation to discover writings. The defendants answered under their common seal, and so not being sworn will not answer in their own prejudice. Ordered, that the clerk of the company, and such principal

principal members as the plaintiffs shall think fit, answer on oath, and that a Master settle the oath. Vern. 117. pl. 104. Hill. 34 & 35 Car. 2. Anon.

Skins. 84.

Hill. 35

Car. 2.

S. C. Lord

Keeper

said, that

the process

against a

company is

by distringas, and not by subpœna, and if they have no effects there is no way to compel them to appear.

56. Bill against a company, if they do *not appear*, it was said the plaintiff may take out a *distringas* against the company, and have it returned *nihil*, and so get a *sequestration* against them, and then by the course of the court the plaintiff need not bring them to hearing. Vern. R. 121, 122, pl. 112. Hill. 1692. Curson v. the African Company.

57. In *pleading change of the name* of the corporation he ought to shew *how*. 3 Lev. 243. Mich. 1 Jac. 2. C. B. Adney v. Vernon.

58. A corporation cannot appear, and therefore *cannot cast an essoin, nor enter into a recognizance*; per Cur. Lord Raym. Rep. 79. Pasch. 8 W. 3. Burghill v. Gibbons and the University of Cambridge.

59. An *information* was exhibited *against the Bailiffs and Burgeses* of Yarmouth; one of the bailiffs (there being 2) *appointed on attorney to appear*, but the other would not consent, and the Court was moved, that their liberties might be seised for want of an appearance; but the better opinion was, that upon an information in nature of a quo warranto, which is *datum est curiæ intelligi*, and which is in nature of a personal action, there cannot be a seisure before a summons, (i. e.) the liberties cannot be seised upon a venire facias, but upon a distringas; but it is otherwise in a quo warranto, for there it is *summonitus fuit*; then it was made a question, whether a warrant of attorney made by one of the bailiffs was not sufficient, because the corporation did not disavow it, but that was determined. 3 Salk. 104. pl. 7. Anon.

60. If a writ be brought by *Hugh, Prior of Coventry*, this too general, and shall abate, but in a lease so made had been good. Gilb. Hist. of C. B. 189.

61. In the Case of the *South-Sea Company*, in whom the estates of the late directors are vested by act of parliament, *where the Statute of Limitations might have been pleaded against the late directors, it is pleadable against the company*, who stand but in such directors place. 3 Wms's. Rep. 143. Mich. 1732. South-Sea Company v. Wymondsell.

62. A corporation shall have the *benefit of the Statute of Limitations* as well as any private person. 3 Wms's. Rep. 310. Trin. 1734. Wych v. East India Company.

(D. a) Misnomer of Corporations. Pleadings.

1. **T**HE king granted to J. N. to found a chantry of 12 priests, and that the provost thereof shall be called *Provost of the Chantry of C.* and the king after brought quare impedit against him by name of *Provost of the House of C.* and therefore the writ abated. Br. Corporations, pl. 21. cites 38 E. 3. 14.

2. *Scire facias against the Prior of St. John of Hierusalem in England* upon a recovery, which was [against the] *Prior of the Hospital of St. John of Jerusalem in England*, the writ was awarded good, because it was known by the *one name and the other*; quod nota, in action against a corporation. Br. Corporations, pl. 10. cites 44 E. 3. 6.

3. *Trespas against J. Abbot of St. Mary's in C.* the defendant said, that it was founded by the name of *Abbot of the Church and Monastery of St. John's of C.* judgment of the writ; Newton said, this is no plea; for it may be known by the one name and the other, and it is good in action against him, and especially in trespass of a tort done by himself; for it was of goods carried away. But if he was to bring action, or if action was brought against him in right of the house, there it ought to be named by the very name of foundation, by which answer; quod nota Markham said, that the house was founded &c. and all as above, and that they and all his predecessors have impleaded and been impleaded by the name aforesaid, and not by the name of the *Abbot of St. John's of C. only*; judgment of the writ. Portman said, the abbot is known by the one name and the other, Prist &c. and a good plea, per Newton, though he and his predecessors have been known by such name. Br. Corporations, pl. 30. cites 21 H. 6. 4.

4. *Quare impedit against the master of a college in Cambridge*; the defendant pleaded, that they are incorporated by another name; judgment si actio; the plaintiff demurred, because he did not conclude to the writ; and per Fitzherbert, the plea is not good without doubt, by which the defendant pleaded another plea, and so see that *misnomer of a corporation goes to the writ*. Br. Corporations, pl. 1. cites 26 H. 8. 1.

5. *In debt against a corporation the corporation ought to be named by its right name*; as if it be J. Prior of Saint Peter, and the corporation is *Saint Peter and Saint Paul*, this is misnomer, and cannot be aided after imparlance, for it is parcel of his name. Br. Corporations, pl. 8. cites 35 H. 6. 5.

6. Obligation was made *Abbati Monasterii de M. extra Muros Eborum*. In debt brought the writ was, *Quod reddat Abbati Monasterii de M. Eborum*, leaving out (*Extra Muros*) and held good, notwithstanding the variance. Gouldsb. 122. cited by Gawdy as 5 E. 4. 20.

7. Where *mayer and commonalty are sued by another name*, they may make attorney by special warranty by their very name of

of the corporation, and so the attorney *shall plead misnomer*; and corporation *cannot appear but by attorney*, because the court cannot know if all appear or not, if they appear in person; per Brian and tot. Cur. Bt. Corporations, pl. 63, cites 21 E. 4. 7. 12. 27. 67.

[310] 8. *Annuity against the Dean and Chaplains of the King's Free Chapel of St. Stephen Westminster*; attorney appeared for them, and made defence, and imparled, and at the day said that they were founded by name of Dean and Chapter of the Free Chapel Royal of St. Mary and St. Stephen Protomartyr, and the opinion of all the justices was, that they shall be estopped to plead it, and this seems to be by reason of the attorney, and imparlance, for it is contrary to his warrant. Br. Corporations, pl. 71. cites 15 H. 7. 14.

9. Trespass by J. Abbot of R. the defendant shewed how he failed of his name of his corporation. Markham Ch. J. said, known by one and the other, or suit by name known is no plea for the plaintiff, for he ought to know his proper name; but if the defendant be named by the plaintiff by name known, though the defendant be corporate, this suffices. Br. Corporation, pl. 82. cites 1 E. 4. 6. and 25 H. 8. the Justices of C. B. agreed this in case of a corporation. But quære, if there be not a diversity between actions real and personal. Br. Corporations, pl. 82.

10 Rep. 132. b. S. C. resolved accordingly. — Where a man makes an obligation to a corporation, they shall declare by their right name, and allege that the obligation was made to them by the other name. G. Hfr. of C. B. 179. cap. 17.

10. An action of debt on a bond was brought against one P. and it was (*ad respondendum Majori Burgensibus de Linn Regis in Comitatu Norfolciæ* P. pleads that it was not his deed; and a special verdict was found, that the mayor and burgesses were incorporated by the name of *Majores & Burgenses Burgi de Linn & non per aliud*; and whether the omission of this *Burgi* should bar the plaintiff, was the question; and judgment was given by Coke, Warburton, and Nichols, for the plaintiff; for Coke said, if the essential part of the corporation was named it was sufficient, and in this case the mayor and burgesses was one essential part, and Linn Regis was another essential part, and those two were duly expressed, and sufficient to maintain the action; and Coke said, that those words (*Et non per aliud*) shall be intended to be *Non per aliud Sensu & non Litera*; and of the same opinion were the other judges there. Brownl. 57, 58. Mich. 10 Jac. Lynn Regis (Mayor &c.) v. Pain.

11. In an act of parliament misnomer of a corporation, when the express intent appears, shall not avoid the act no more than in a will, for parliament, *testament* and *arbitrament*, are to be taken according to the minds and intentions of those that are parties to it; and therefore when the description of a corporation in an act of parliament, or a will, is such, that the true corporation intended is apparent, and it is not possible to be intended of any other corporation, though the true name of corporation (which is requisite to be expressed in grants and deeds) be not precisely pursued, yet the act of parliament

parliament and will shall take effect. 10 Rep. 57. b. Trin. 11 Jac. Chancellor &c. of Oxford's Case.

12. A corporation *by prescription* may have *several names by reputation*; as if they are called by one name, though it is not exactly the right name, yet if it *suffices to describe the persons* they must answer the writ. Arg. 11 Mod. 67. pl. 9. Mich. 4 Ann. B. R. in Serjeant Whitacre's Case.

13. The names of corporations are not arbitrary sounds merely so individuiative, but *have a certain and significant meaning*; and if that be kept to, though the words and syllables be varied, yet the body politick is very well named, for then there is enough said to shew that there is such an artificial being, and to distinguish it from others, G. Hist. of C. B. 181. cap. 17.

New. Abr.
502. in totidem
verbis.

14. Upon error out of C. B. upon a *Qua. Imp. by the Chancellor and Scholars of the University of Cambridge* against the archbishop &c. upon the 3 Jac. 1. cap. 5. disabling Popish Recusants Conviēt from presenting &c. and vest such presentations in the *chancellor and scholars* of the two universities respectively. Defendant had pleaded in abatement, that the *incorporation was by the name of Chancellor, Masters, and Scholars* &c. and so they had sued by a wrong name. It was insisted for the plaintiff in error, that the name of a corporation was like the name of baptism, and it was debated, whether the act of parliament vested this right in them by the name of Chancellor and Scholars, was an *incorporating them by such name, quoad this particular purpose*, or whether it operated only by way of *descriptio personæ*, as in a devise, and not by way of incorporating them. Per Parker Ch. J. the declaration sets forth the act of parliament as an authority to sue by that name, which puts it on the defendant to shew some special matter to avoid it, as the *acceptance of another charter by another name* subsequent to the statute; per Powis senior, chancellor and scholars is such a name, as comprehends the whole university, both head and members; per Eyre and Powis junior J. non sequitur, that what will be sufficient to amount to a *descriptio personæ* to enable a person to take, will be sufficient for him to sue in. Adjournatur. 10 Mod. 207. B. R. Cambridge University v. Vavasor, and Crofts, and Archbishop of York. Hill. 12 Ann. B. R.

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For more of Corporations in General, See *Wye Alatus. Grants. Pandanus. Successor.* And other Proper Titles.

Costs.

Introduction of Costs, and the Original of them.

1. *STATUTE of Marlebridge, 52 H. 3. cap. 6.* was the first statute that gave the defendant damages and costs, if it were found for him. 2 Inst. 112.

It seems that none could have recovered damages in plea real,

but in plea personal and mixt assumps; for by the Statute of Merton cap. 1. damages are given in dower upon dying seised of the baron, and by other statutes damages are given in writ of entry sur disseisin, and in Ayl and Cofnage, and see the Statute of Gloucester cap. 1. that in all cases where a man recovers damages he shall recover costs; and yet where great damages are given by the statute, he shall not recover costs, and therefore it seems that the Statute of Gloucester is intended to give cost where single damages are to be recovered. Br. Costs, pl. 29.

Before this statute, at the common law, no man recovered any costs of suit either in plea real, personal, or mixt. 2 Inst. 288.

Here is express mention made but of the costs of his writ, but it extends to all the legal costs of the suit, but not to the costs and expences of his travel and loss of time. 2 Inst. 288.

Before the making of this statute, no demandant recovered damages in any real action, but only in a writ of dower unde nihil habet, by the Statute of Merton, cap. 1. 2 Inst. 289.

3. *And this act shall hold place in all cases where the party is to recover damages.*

[321] This clause does not extend to give costs where damages are given to any demandant, or plaintiff in any action by any statute made after this parliament; ubi dampna dantur, victus victori in expensis condemnari debet. 2 Inst. 289.

Generally this branch gives damages to him that right has; and his heirs, against the intruder, abator, disseisor, or other wrong-doer himself. 2 Inst. 289.

4. *And every person from henceforth shall be compelled to render damages where the land is recovered against him upon his own intrusion, or his own act.*

5. If the plaintiff be barred or nonsuited at common law, all the punishment, regularly, is amercement. Jenk. 161. pl. 7.

New. Abr. 511. S. P. in totidem verbis citat 2 Inst. 288. but I do not observe S. P. there.

6. There was no such thing as costs of suit at common law; but if the plaintiff did not prevail he was amerced pro falso clamore; if he did prevail, then the defendant was in misericordia for his unjust detention of the plaintiff's right, but this made the plaintiff no amends for the costs that he had laid out of pocket, in obtaining his right; so it stood till the Statute of Gloucester,

Gloucester, cap. 1. but by that statute, if any person recovered damages in a plea personal or mixed, he should have his costs, which was the *original of costs de incremento*; for then damages were found by the jury, and it was thought no dishonour to the Court, to tax the moderate fees of counsel and attorneys that attend the cause; so matters stood for the plaintiff till 48 *Eliz. cap. 6.* *Gilb. Hist. of C. B.* 210.

7. There were *no costs at common law* given *ex professo* under that title, but the plaintiff was punished in amercement to the king pro falso clamore, and the defendant in misericordia, where the judgment was against him, *cum expensis litis* under that title, because he would suffer twice for the same fault; but it seems *in the iters* where the expences of the suits began to encrease, *they were wont to give their costs in the gross, and unblended with the damages*, and the Judges being in these iters, assisted with the officers of the Court, and not hurried or strained in their sittings, they could easily make a computation of such costs; but when *Ed. 1.* was changing his iters, and bringing in residuary Justices to go the circuits and try the causes in their counties, that there might be the same uniform law, then it was necessary the costs should be taxed above, and not at the assizes; and thence by the Statute of Gloucester, the 6 *E. 1.* they introduced costs to the plaintiff, and the words are, *viz. upon the assizes, writs of coſinage &c. the demandant shall recover against the tenant the costs of his writ purchased, together with the damage aforesaid, and all this shall be holden in all causes where a man recovers damages; this brought in costs in real actions, where there were no damages, and also in all personal actions, for even in action of debt there are damages for the unjust detention, and upon demurrer the damages are confessed, and therefore there is a sufficient authority for the Court to assess the expence of damage.* *Gilb. Hist. of C. B.* 214, 215.

[A] To whom Costs shall be given,
[And against whom.]

Fol. 516.

[1.] IF baron and feme join in an action, and a *verdict* is given for the plaintiff, and the jury assess damages *ultra misas & custagia per ipsum* (who is the baron), *circa sectam suam expōita* to so much, & *pro misis & custagiis aliis*, to so much, and thereupon judgment is given, that the baron and feme shall recover the costs and damages, though it is found, that the baron only expended and disbursed the money for the costs of the suit, inasmuch as the feme had nothing, yet the judgment is good, that the baron and feme shall recover the costs, for there cannot be one judgment for the costs, and another for the damages. *M. 9 Car. B. R. between Crusee and Berry, adjudged in a Writ of Error. Intratur Cr. 9 Car. Rot. 1163.]*

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2. An infant of 12 years of age was *lessor in ejectment*, the *lessee* was nonsuit; the father of the infant who prosecuted the suit was dead; 50l. costs were given to the defendant, whereupon the Court made a rule, that the lessor should pay costs. It was doubted in this case, because of his infancy; but if his father had been alive, they would have made him pay the costs, or if he had left assets, his executor should, but here was nobody but the infant to be charged. *Advifare vult.* Freem. Rep. 373. pl. 478. Mich. 1674. B. R. Anon.

3. Trustees that act contrary to their trust shall pay costs. MS. Tab. 1702. *Haberdasher's Company v. Attorney-General.*

4. Where on a bill to call a trustee to account, he by answer submits readily to it, though, found in debt, he shall pay interest for the balance only from the time of the account liquidated, and no costs; otherwise if he controverts the account, there if found in arrear shall pay interest and costs, as the plaintiff must have done if he had been found indebted to him. Chan. Prec. 254. pl. 206. Hill. 1705. *Parrot v. Treby.*

5. Lord Chancellor King; An infant by *prochein amy* brings a bill, and never stirs in it after he comes of age, and the bill is dismissed. The infant is liable to pay costs, and must take his remedy over against the *prochein amy*. 2 Wms's. Rep. 297. pl. 80. Trin. 1725. *Turner v. Turner.*

6. The inhabitants of a hundred have a capacity to sue for the costs of a nonsuit in consequence of the Statute of Winton, and of 23 H 8. Gibb. 296. Trin. 5 Geo. 2. C. B. *The Inhabitants of the Hundred of Laurefs v.*

(A. 2) In what Cases.

S. C. cited by Richard-son. Hett. 261.

1. **ASSUMPSIT**, for that the defendant, in consideration of such clothes delivered at such a place, promised to pay 8l. and in consideration of a debt upon arrearages of account, the defendant being indebted in 18l. the defendant promised to pay it. The defendant pleaded non assumpsit; and found against him, and several damages assessed, but entire costs, and judgment accordingly for the plaintiff. And error thereof brought and held that the consideration upon the 2d assumpsit was not sufficient; but for the 1st, and for the entire costs, the judgment was affirmed; and for the 2d assumpsit, it was reversed. Cro. E. 537. pl. 72. Hill. 38 Eliz. *Grymston v. Reyner.*

So in trespass for battery brought against a constable who was found not guilty, and that what he did was as officer,

2. In action on the case the plaintiff was nonsuited, and it was moved, that no costs should be given against him, because the declaration was insufficient in law, so that if the verdict had passed for the plaintiff, he could not have judgment, but it was answered, that it had been often ruled, that the defendant should have costs notwithstanding the insufficiency of the declaration, and that it never was denied but only in GRIMSTON'S CASE, for costs are given for vexation, cites it

It as agreed per Cur. D. [32. a. b. pl. 5. 6.] 18 H. 8. [but it is misprinted, and should be Pasch, 28 & 29 H. 8.] [where it was so held by Fitzherbert and Baldwin, but Englefield dubitavit.] 2 Roll. Rep. 88, Pasch. 17 Jac. B. R. Pafford v. Webb.

the plaintiff shall not take advantage of the insufficiency of the writ and declaration to excuse themselves of costs. Cro. C. 176. pl. 20. Mich. 5 Car. B. R. Maylor's Case.

3. But after judgment reversed debt does not lie for the costs given upon the first judgment. D. 32. b. Marg. pl. 6. cites Pasch. 1 Car. B. R.

4. In ejectment the plaintiff mistook his venire facias, and the jury found for the defendant. The defendant had judgment for his costs notwithstanding the venire was mistaken. Godb. 329. pl. 423. Arg. cites Mich. 18 Jac. Done v. Kuott.

S. C. cited and S. P. resolved accordingly. Palm. 365. Pasch.

21 Jac. B. R. Prichard v. Reynold. — 2 Roll. Rep. 327. S. C. resolved accordingly. — Hed. 146. Mich. 5 Car. C. B. KNIGHT v. SIMMONDS, the exception that the venire was miswritten was allowed, and because the defendant might have judgment he cannot have costs; and Richardson said that B. R. in action on the case of GRIMSTON v. HOSKIN, it was found against him, and the plaintiff for the prevention of costs alleged, that the declaration was not sufficient, and it was allowed; but if the plaintiff be nonsuit he shall not have benefit of such exception to prevent costs, by reason of the unjust vexation. — S. P. as to the nonsuit. Hob. 284. pl. 367. Trin. 16 Jac. Steward v. Sudbury.

5. A man inhabiting in the most remote part of England was arrested eight times by latitat, and no declaration is put in; and the counsel prayed costs for the defendant. The Prothonotary said, that he shall not have costs, unless he come in person; but Richardson said, on the contrary, he shall have costs; for it appears that he had been put to travel, and a day given to shew cause why the costs shall not be given. Het. 73. Hill. 3 Car. C. B. Fenn v. Thomas.

6. Whether costs might be given on a special verdict, the Court doubted; for the Statute 23 H. 8. cap. 15. says, that where a verdict is found against the plaintiff; but in a special verdict it is neither found for or against; but it may be said, that when it is adjudged against the plaintiff, then it is found against him; and 4 Fac. cap. 3. which gives costs in an ejectione firmæ, had the same words, if any verdict &c. But it may be answered, that as in demurrer no costs shall be recovered, no more in a special verdict, for that the plaintiff had a *probabilem causam litigandi*, and the statute may be intended of vexatious suits &c. Het. 144. Trin. 5 Car. C. B. Fawkenbridge's Case.

7. Affidavit that the defendant owed but 40s. the Court ordered the plaintiff to shew cause why he should not accept it, and on refusal he shall have no costs, unless he proves more due. 2 Keb. 152. pl. 27. Hill. 18 & 19 Car. 2. in B. R. Rhodes v. Brooks.

8. A prohibition was prayed to the Ecclesiastical Court of Lincoln, for that the plaintiff was prosecuted there ex officio upon articles exhibited against him for not coming to church, and

sitting irreverently there when he did come, and because they taxed costs against him, the Court doubted, whether costs ought to be taxed, because it was not a cause between party and party, but promoted ex officio judicis, & per instantiam curiæ, though a person be assigned by the Court to prosecute it. Afterwards, by the mediation of the Court, the costs were mitigated, and the party submitted to pay them, and to conform to the laws of the church. Hard. 503. pl. 10. Mich. 20 Car. 2. in Scacc. Browne v. Lake.

[325] 9. If the defendant *pleads a plea in abatement, and plaintiff confesses it*, the plaintiff thereby saves costs; per Cur. 12 Mod. 145 Mich. 9 W. 3. Greenhill v. Shepherd.

10. When *proceedings are set aside for irregularity*, there shall never be costs; per Holt Ch. J. 12 Mod. 435. Mich. 12 W. 3. Anon.

11. In *debt on bond*, though the money be tendered before action brought, which is refused, yet the plaintiff must have costs; for the statute gives the Court no jurisdiction till after action brought, and therefore they cannot take notice of a tender before. Resolved, 10 Mod. 26. Trin. 10 Ann. B. R. Player v. Bandy.

12. Where *defendant impails, and a 3d person demands conu- sance of pleas*, which is refused to the 3d person as coming too late, but which otherwise would have been granted, no costs shall be paid. 10 Mod. 156, Pasch. 12 Ann. B. R. Manners v. Perne.

13. *Three declarations for one and the same battery being ordered to be reduced into one*, plaintiff's counsel prayed costs, but was denied. Notes in C. B. 250. Hill. 7 Geo. 2. Harper an Attorney, v. Woodhouse and others.

14. Plaintiff's attorney delivered a *very long declaration* for entering plaintiff's house and taking and carrying away his goods, and in every count repeated the particulars contained in an inventory of the defendant's goods taken at the time they were distrained for rent, on account of which distress this action was brought, with some small variance in the description of the goods, and laying the trespasses on different days; the Court, upon hearing counsel on both sides, it appearing that the action was brought for one and the same trespass, *ordered two of the counts to be struck out, and the attorney to pay costs.* Notes in C. B. 239. Hill. 9 Geo. 2. Mackdonald v. Gunter.

15. Motion to set aside *plea in abatement*, which came in two days after declaration left at defendant's attorney's chambers, under the door, which was not found there till November 1st. The agent had appeared for the country attorney, and plaintiff had given no notice to the agent of declaration being filed or left; per Cur. whether the plea came regularly in or not is the only question? and the declaration not being delivered, nor any notice to the agent of its being filed, the rule for setting aside the plea was discharged with costs, it being *tricking practice* to put

put the declaration under the country attorney's chamber door. Notes in C. B. 251, 252. Mich. 12 Geo. 2. Burnett v. Kendall.

16. In what cases costs are discharged by a general pardon. See Tit. Prerogative (S. 2) pl. 13; and the Notes there.

(A. 3) For not going on to Trial.

1. **W**HERE, upon notice of trial, the defendant makes affidavit, that he attended with his counsel and witnesses, and the plaintiff did not proceed to trial, the Court here will make a rule for the secondary to tax the defendant his costs, if he finds that costs ought to be taxed. 2 L. P. R. 243.

2. The king shall pay costs for an amendment, but shall not pay costs for not going on to trial; but where there is a prosecutor, he shall pay costs for amendments, and not going on to trial both, but then there must be an affidavit of the name of him who is the prosecutor, for that does not appear upon the indictment; and if the defendant does not know the prosecutor, he ought to apply to the Attorney General, who will inform him. 1 Salk. 163. pl. 2. Hill. 8 W. 3. B. R. The King v. Edwards. [326]

3. If upon notice of trial defendant draws breviate, retains counsel, and makes ready his witnesses before that notice is countermanded; upon affidavit thereof and motion, he shall have such costs as Master shall tax. 12 Mod. 560. Mich. 13 W. 3.

4. On a motion for costs for not going on to trial it appeared that a countermand was given on Sunday, the day before the commission-day, which it was said would have been good, had it not been on a Sunday, but the Court held, that costs should be allowed. Rep. of Prac. in C. B. 15 Mich. 4 Geo. 1. Deighton v. Dalton.

5. Action was laid in Cornwall. Notice of trial was given in town, and countermanded in the country three days before the commission-day of the assizes. The question was, whether this was a good countermand to prevent costs for not proceeding to trial, defendant having sent a witness from London, who was got as far as Exeter before he heard of the countermand? per Cur. Notice of trial cannot be given in the country, but may be well countermanded there; and though by that practice defendant is put to an inconvenience in this case, yet the inconveniences which must necessarily accrue from the contrary practice would be much greater. The countermand would have been good if given but two days before the commission-day. Notes in C. B. 212, 213. Trin. 8 & 9 Geo. 2. Goodright, on the Demise of Hawkey v. Hoblyn.

Sec (B)

(A. 4) To whom; And against whom;
Informers.

S. P. per Shute; and it was held, that the party grieved is a special person, and is not to be intended of every party grieved; for it is a grief to every good subject to see another offend the law; but party grieved

by this statute is he that has damage; and to this the Court agreed. *See* 50, 51. pl. 106. *Pfich.* 25 *Eliz.* Walker's Case. — Where the party grieved brings the action upon a penal law, he shall have costs if he recovers, but contra if it be brought by a common informer. *Lord Raym. Rep.* 172. cited by *Fewell J.* as adjudged in *C. B. Trin. 8 W. 3.*

1. BY the words of the Statute 18 *Eliz. cap. 5.* [S. 3] That every informer upon a penal statute that shall willingly delay suit, discontinue, or be nonsuit, or against whom the matter shall pass by verdict, or judgment, shall pay costs, it was held, that all informers upon penal statutes, which give action to him that will sue, shall be said to be an informer in the common course of informers, and shall be considered as common informers, though they never before informed against any; but where a statute gives the moiety, or other part to the party grieved, and not to him that will sue in common, there if one informs for himself and the queen, he is not within the compass of the statutes. This difference was taken for law, and judgment accordingly. *And.* 116. pl. 162. *Knevet v. the London Butchers.*

2. Information upon the Statute 21 *H. 8. cap. 13. against two persons* (viz.) against one for non-residence, and against the other for taking a farm; one of them pleaded sickness, and that by advice of physicians he removed into a better air for recovery of his health; the other pleaded, that he took the farm for maintenance only of himself and family; these were both good pleas, and the informer not proceeding, but having brought this information only for vexation, and to make the defendants compound with him, they exhibited another information against him upon the Statute 18 *Eliz. cap. 5.* and moved the Court, that because the informer was a mean person, he might give bail to answer the costs, but it was denied, but made a rule, that the defendants should not answer the information before the informer appeared in person. 2 *Bull.* 18 *Mich.* 10 *Jac.* *Martin's and Gunnyftone's Case.*

3. Upon an information for perjury *Holt Ch. J.* said, if the prosecutor gives notice of trial (though in an information) the first assizes, and does not proceed, the defendant must have costs. If the persons indicted gives notice, the prosecutor shall have costs. *Comb.* 225. *Mich.* 5 *W. & M.* in *B. R.* the *King v. Allen & al.*

4. Whether in an action by informer &c. for 5l. upon 31 of *El.* for selling an horse without tolling &c. *See* 3 *Lev.* 374. *Mich.* 5 *W. & M.* in *C. B.* *Sedgwick v. Richardson*, where *Levins*, who was counsel for the plaintiff, says, that judgment was given for the plaintiff.

But *Lutw.* 201. *S. C.* reports, that he (*Lutwich*) was the only counsel with the

defendant, and that he always after the case was moved till the report of it in 3 *Lev.* took it, that the rule of Court was, that no costs were given in this case; but this report put him on further enquiry, and for that purpose he saw the record, but no judgment is entered on the roll, nor

is there any footsteps of the case in point of costs to be found by the remembrance, or the court-book; but says, that what gives him full satisfaction that the Court gave no costs, is, that the defendant himself informed him now, as he had done before, within a little time after the case was debated, that he had only paid the penalty, viz. the 10*l.* in discharge of the suit against him.

5. In an *information against D. and others*, one defendant was acquitted, and the rest found guilty at the assizes, and though the Judge did not certify a probable cause, yet it was held, that the prosecutor was not liable to pay this defendant's costs, because till the 8 & 9 *W. 3.* the plaintiff never paid costs in any action, if but one defendant was found guilty; and the act of 4 & 5 *W. & M. cap. 18.* cannot be intended to make prosecutors otherwise liable than as plaintiffs were before in other actions. 1 Salk. 194. pl. 5. 6 Ann. B. R. the Queen v. Danvers & al.

6. In an *information filed in the attorney general's name for beating a custom-house officer*, the prosecutor had given notice of trial, but not countermanded it, till the defendant had retained his counsel, and was ready to attend, upon which Mr. Kettleby moved for costs; but Mr. Masterman informed the Court, that in informations of this nature, where the king's name is more than barely made use of, the Crown never receives nor pays costs; accordingly the Court refused the motion. Barnard. Rep. in B. R. 275. Hill. 3 Geo. 2. the King v. Go-haire.

(B) In what Actions.

[1. **I**N a prohibition, if issue be joined among others, whether the defendant hath prosecuted in the Court Christian after the prohibition granted, and it is found against the defendant, the plaintiff shall have his costs, as well as where the defendant is found guilty in an attachment upon a prohibition. Mich. 15 Car. B. R. between Facey and Lauge adjudged, and then vouched Trin. 7 * Car. B. where it was so resolved per Cur. upon a view of several ancient proceedings.]

S. C. at da-
mages (P)
pl. 24. —
Jo. 477.
pl. 21.
Facy v.
Lang & Co
adjudged.
— Gro-
C. 559. pl
1. S. C. and
cited a case

in C. B. where the suit being commenced in the spiritual court after a prohibition delivered, an attachment issued on the prohibition, and because the party was damaged, and put to his suit of attachment, which was found to be sued, the party there recovered damages and costs, and so the Court unanimously agreed here, that the party should have his damages and costs found by the jury, and judgment accordingly nisi. — S. C. cited g. Lev. 360.

* Jo. 447. cites it as 7 Jac.

[2. In an action upon the statute of 21 H. 8. [cap. 6.] for taking a mortuary against the statute, the plaintiff shall have some costs, though it is on a penal law, because it is brought for a debt. New Entries 164. Contra Mich. 12 Jac. B. Smith's Case, per Curiam.]

See tit. Mor-
tuary (A)
pl. 5. and
the notes
there-

[3. If costs are awarded to the defendant in a prohibition by the Statute of 2 E. 6. upon a consultation granted, and the party for whom they are awarded brings debt for them, he shall have

his costs in this suit. Mich. 22 Jac. B. R. between *Cockram and Davis*, dubitatur; but H. 22 Jac. B. R. it was adjudged per Curiam, that he shall have costs, because this is *a new suit and judgment*.]

This Case is in D. 177. b. pl. 33. — Kelw. 209. a. pl. 12. Mich. 2 & 3 Eliz. Daniel's Cafe. S. C. Chart. 289.]

[4. In an action of *debt upon the statute of 1 & 2 Ph. & Ma. cap. 12. of distresses* upon the branch of the statute, by which the 5l. and triple damages are given to the party grieved, for driving a distress out of the hundred, no costs are to be given by the law, because the statute by intendment gives treble damages in lieu of the whole. D. 2 Eliz. 177. 32 Co. Magna

accordingly. — Bendl. 80. pl. 125. S. C. — Note, that where *action penal* is given by statute to recover a great sum by action of debt for ingrossing &c. there the plaintiff shall not recover costs and damages in this action of debt. Br. Damages, pl. 200. cites 35 H. 8. & Trin. 4 M. 1. — Br. Costs. pl. 32. cites 35 H. 8. S. P. — Br. N. C. pl. 258. cites 35 H. 8. & Trin. 4 M. 1. S. P. — 10 Rep. 116. b. cites Br. Damages, pl. 200.

Cro. C. 559. pl. 3. North v. Wingate S. C. resolved per tot. Cur. and that when a statute

* Fol. 517.

gives a penalty certain, and gives an action of debt, if the defendant does not pay upon demand, but enforces the party to a suit, when he recovers he shall recover his damages, because he

[5. But upon the branch of this Statute of 1 & 2 Ph. & Ma. by which it is enacted, *That if any one takes more than 4d. for impounding a distress, he shall forfeit 5l. to the party grieved, over and besides the sum taken ultra 4d.* if any action of debt be brought by the party grieved for the 5l. for that the defendant took 6d. ultra the 4d. for the impounding a distress, and the defendant pleads *Nil debet*, and it is found against him, the jury ought to give (*) costs; for here *this is a certain debt* before the action brought, though it be by a penal law, and costs shall be given for the delay in non-payment of the money at the return of the summons, as he might have paid it, and been discharged of his costs; for *this is not like* to the first branch of this statute, where triple damages are given, nor to other penal statutes, where the damages or debt are uncertain, as upon the 2 Ed. 6. till recovery. Mich. 15 Car. B. R. between *North and Musgrave*, in a writ of error upon a judgment in Banco, where costs given upon advice, adjudged per Curiam, and the first judgment affirmed. Intratur Tr. 15 Rot. 975. New Entries 163. upon the Statute of 13 Eliz. cap. 5. of *Forgery of false Deeds*, New Entries 164. upon the Statute of 21 H. 8. cap. 6. of *Mortuaries*, costs given.]

did not pay the duty by the statute upon demand, and he shall also have costs, or otherwise he may expend more than he recovers; but where the duty is uncertain, as to recover treble damages, as on the Statute of Waste, or not setting out tithes, there no more is given but the treble value, and no costs. — Jo. 447. pl. 9. *Mulgrave v. North* S. C. adjudged. — Mar. 56. pl. 88. and 61. pl. 95. *North v. Mulgrave*, S. C. adjournatur. — S. C. cited Arg. Vent. 133. Trin. 23 Car. 2. B. R. but the Court held, that costs and damages ought not to be given in actions popular, be the forfeiture certain or not; but where a certain penalty is given to the party grieved, there he shall recover his costs and damages, *Eaton v. Barker*. — In debt on the Statute 5 Eliz. cap. 9. about witnesses the Court held, that no costs shall be in a popular action, be the penalty certain or uncertain; but where the party grieved shall have penalty certain, he shall have costs. 1 Salk. 206. pl. 4. Trin. 9 W. 3. B. R. *Shore v. Madiston*. — Comb. 449. S. C.

[329] accordingly. — Some diversity per Cur. Carth. 230, 231. Pasch. 4 W. & M. in B. R. The corporation of *Plymouth v. Collins*, which was debt for a penalty of 20l. brought by the corporation qui tam &c. on a private act of parliament, concerning the New River Water brought to Plymouth, for diverting the water course, contrary to the statute and held per tot. Cur. that the plaintiffs should have costs, because here was a certain penalty given to certain persons, and so within the rule of costs. — Skinn. 363. pl. 6. and 367. pl. 14. Mich. 5 W. & M. in B. R. same diversity taken in case of the company of cutlers in Yorkshire v. Ruffin,

kin, which was an action on a private act of parliament for a penalty, for retaining an apprentice contrary to that act, and ruled that costs be given, and cites the case next above. — Comb. 224. Cutler's Company in Yorkshire v. Hursley, S. C. — 12 Mod. 46. Cutler's Company &c. v. Bulkin, S. C.

(5. bis) [In an action upon the statute of 2 H. 4. cap. 1. *This is the Case of Domingo Bignola v. Pointell cited 10 Rep: 116, a. — Ibid. 116. b. gives the* for suing before the admiral for a thing done upon the land, in which case the statutes gives to the plaintiff double damages without speaking of any costs, yet he shall recover as well double costs as double damages. Co. 10. Bilford [Pilford] 116. D. 4, 5. Ma. 159. [b. pl. 37. 38.]

reason, for that this is a statute of addition; because damages and costs were in such case recoverable at common law, and cites 8 E. 4. 13. b. 14. a. and the statute increases the damages to double, and yet he shall recover costs also; for the statute in increasing the damages does not take away the costs. — S. C. cited Skinn. 555. — See Lawton v. Story.

[6. And in the said action upon 2 H. 4. the jurors may assess the damages and costs entirely, if they will; for damages include all. Co. 10. Pilford 116.]

[7. But it seems upon the Statute of 2 H. 4. no costs shall be given *de incremento* by the court, but only the costs given by the jury shall be double, and nothing *de incremento*. Hill. 16 Car. B. R. between Trelawny and Babbe, so done upon advice. Intratur P. 16 Car. Rot. 137.]

[8. But Master Hoddeldon said, there were some precedents that the costs given by the jury should be doubled, and also the costs given *de incremento*; but it * seemed to him the other day, scilicet to double the costs given to the jury only, without any increase by the court, to be the sure and safe way.] * S. C. cited and held contra. Skin. 555, 556.

9. In waste the plaintiff shall not recover costs, because great damages are given by statute. Br. Waste, pl. 118. cites 2 H. 4. 17. 10 Rep. 116. b. S. P. obiter and S. C. cited per Cur.

for this is a law of creation, and gives remedy where none was before, and therefore no costs shall be recovered.

10. Writ of waste was brought, and the waste found, and Skrene prayed that they inquire of the damages of his writ and suit, viz. costs, as it seems; and per Rickhill and Thirn. where damages are given all by the statute, as in waste, *decies tantum, quare impedit*, &c. a man shall not recover other damages than are in the statute, quod curia concessit. Br. Costs, pl. 6. cites 2 H. 4. 17.

11. In *quare impedit*, the plaintiff recovered damages without costs; for where damages are given by statute since the Statute of Gloucester in certainty out of the course of the common law, a man shall recover that which is limited in the statute, and not otherwise, and therefore he shall not have costs in *quare impedit*. Br. Costs, pl. 1. cites 27 H. 6. 10. Ibid. pl. 27. cites S. C. that the plaintiff shall recover the presentment and damages, but not

costs; because great damages are given by the statute. — Fitz. Damage, pl. 29. cites S. C. — Keilw. 26. a. pl. 2. B. R. S. P. by Fineux Ch. J. — 2 Inst. 289. S. P. — 10 Rep. 116. a. b. S. P. because the Stat. W. 2. cap. 5. which gives damages, is an act of creation, and cites S. C. — Skinn. 25. Mich. 33 Car. 2. C. B. it was ruled, that if it be a *Quare imp.* by common law, then there shall be no costs, but otherwise if it be by statute; and if the church

is full of the defendant by institution, then it is a *Que. imp.* within the statute, but if it is not, then it is at common law; and cites *Co. Ent.* 508, 509.

In *Decies tantum*, which is a law of

creation, the plaintiff shall recover the penalty given by the Statute [39 E. 3. cap. 12.] and no more; because it is a law of creation; per *Cur. 10 Rep.* 116. b. *Mich.* 10. *Jac. B. R.* in *Piffold's Case*, cites a *H.* 4. 17. b.

10 Rep.
116. b. S. P.
and cites
S. C.

*12. So in a *Decies tantum* the plaintiff shall recover no costs. *Br. Costs*, pl. 1. cites 27 *H.* 6. 10.

13. Contra it is said in *ravishment of ward*. *Br. Costs*, pl. 1. cites 27 *H.* 6. 10.

14. *W.* brought an *action upon the Statute 1 & 2 P. & M.* against *B.* for unlawful impounding of *distresses*, and was nonsuit; it was moved by *Shuttleworth Serjeant*, if the defendant should have costs upon the Statute of 23 *H.* 8. and it was adjudged, that he should not; and that appears clearly by the words of the statute &c. for this action is not conceived upon any matter which is comprised within the said statute, and also the statute upon which this action is grounded, was made after the said Statute of 23 *H.* 8. which gives costs, and therefore the said Statute 23 *H.* 8. and the remedy of it, cannot extend to any action done by 1 & 2 *P. & M.* And *Rhodes J.* said, it was so adjudged in 8 *Eliz.* 3 *Le.* 92. *Pasch.* 26 *Eliz.* in *C. B.* *Wrennam v. Bullman*.

15. *Debt* brought in *B. R.* for 16 s. costs of suit given in an inferior court upon a nonsuit upon the Statute of 23 *H.* 8. Adjudged that the action did lie, though against the Statute of Gloucester, which is, that no action shall be brought here for any sum under 40 s. *Cro. E.* 96. pl. 11. *Pasch.* 30 *Eliz.* *Br. R.* *Harward v. Furborne*.

16. *Avowry for an amercement in a leet, for not doing suit*, the plaintiff was nonsuited, for which the defendant had a return, and he prayed his costs, but the opinion of the Court was, he should not have costs, for it is not such a thing for which the statute doth give costs, for it extends only to customs and services. *Cro. E.* 300. pl. 15. *Pasch.* 34 *Eliz.* in *B. R.* *Porter v. Gray*.

17. *Action upon the Statute 5 Eliz. for perjury*, it was found for the defendant, and 9 l. assessed for costs to him; and it was moved, that costs shall not be given against the plaintiff, for he sueth as a party grieved, and not as a common informer, and so not within the Statute 28 *Eliz.* but it was answered, that costs shall be here upon the Statute 21 *H.* 8. which giveth it upon every action upon statute. *Gawdy*, this cannot be, for the Statute 5 *Eliz.* was made after that statute. *Quare* of it. *Cro. E.* 177. pl. 4. *Pasch.* 32 *Eliz.* in *B. R.* *Spire v. Rofs*.

18. In *battery*, the defendant was bail for *A.* and *B.* who afterwards were condemned; error was brought in the Exchequer Chamber, and the first judgment was affirmed, and other new costs given by the justices there, and the record was remanded into *B. R.* and now a *scire facias* was prayed against the

the bail, as well for the damages upon the first judgment, as for the costs given in the Exchequer; It was the opinion of the Court, that the *bail was not chargeable with the new costs*, for they take upon them to pay only the condemnation of this court, and not of any other court. Cro. E. 587. pl. 21. Mich. 39 & 40 Eliz. B. R. Penruddock v. Errington.

19. On a *libel for tithes*, the defendant *suggested a modus as to part of the tithes, and a contract executed in satisfaction for the rest*; and because he proved not his suggestion within 6 months, the parson had a *consultation, and costs assessed*. In debt brought in C. B. for the costs, the plaintiff had judgment. Error was brought in B. R. and assigned, that no costs ought to be assessed, because the *suggestion for the prohibition was grounded upon the modus, which must be proved, and also upon the contract, which needs no proof*, and therefore the suggestion being entire, and part of it needing no proof, they could not give any costs; for that is where the whole matter of the suggestion requires proof. Yelv. 119. Hill. 5 Jac. B. R. Cobb v. Hunt. [331]

Brownl. 98. S. C. seems only a translation of Yelv.

20. Note, it was the opinion of all the justices, and so declared, that if the plaintiff in an *ejectione firmæ* doth mistake his declaration, that the defendant in such case shall have his costs of the plaintiff by reason of his unjust vexation. Godb. 345. pl. 439. Trin. 21 Jac. B. R. Anon.

21. In *assise* brought against D. the *plaintiff was nonsuit*, and D. moved to have costs, and it was denied by the whole Court, because an assise is not within the words of the statute. Brownl. 28, 29. Anon.

22. In an action for *slandering the defendant's title* the plaintiff had judgment. It was assigned for error, that 10 s. damages were given, and yet 11 l. was given for costs. The Ch. J. thought it error, because action on the case for slander was within the Statute 21 Jac. [cap. 16.] but the three others e contra; for though it is within the first branch as to actions to be brought within the time limited, because in that case the words of the statute are general, actions on the case; yet the clause for costs are, actions on the case for slander, and *this ought to be to the person of a man, and not to the title of lands*; for this is not properly a slander, but a cause of damage. Jo. 196. pl. 8. Mich. 4 Car. B. R. Low v. Harwood.

Cro. C. 140. pl. 16. Lawe v. Harwood. S. C. held accordingly, but says, that Hide Ch. J. seemed to doubt. — Palm. 529. Harwood v. Lowe S. C. and S. P. held accordingly by three judges.

ties, and Hide Ch. J. said nothing one way or other. — Ley Sz. Low v. Woodward S. C. resolved not to be within the statute. — Gilb. Hist. of C. B. 227. S. P. and in margin S. C.

23. F. brought an action of *trespass* against D. *for entering into his house, and breaking open his chest, and taking away his goods*. The defendant pleaded a special plea, viz. that he did it by way of distress for rent due unto him. The plaintiff replied, *De injuria sua propria absque tali causa*; upon this an issue was joined, and a verdict found for the plaintiff.

Roll

Roll Ch. J. said, that he must pay costs, otherwise there shall be vexation without amends; therefore let the plaintiff take his judgment. - Sty. 153. Mich. 24 Car. B. R. Frank v. Dixon.

24. Plaintiff in a *scandalum magnatum* shall have no costs, though he has a verdict. 2 Show 506. pl. 467. Hill. 2 & 3 Car. 2. B. R. in a nota at the end of the Case of Lord Peterborough v. Williams.

25. In an action upon the Statute 8 H. 6. of forcible Entry, the secondary craved the direction of the Court before he could tax costs; and they were doubtful in it, and rather inclined the plaintiff was to have no costs; but upon the view of PILFORD'S CASE, in 10 Rep. and the books there cited, they resolved that he should have treble costs. Vent. 22. Pasch. 21 Car. 2. B. R. Skier v. Atkinson.

26. Serjeant Darnel moved for the defendant, that whereas the Judge that tried the cause, *certified only an assault, and no battery*; yet the plaintiff had sued out and executed an execution for his full costs, which exceeded the damage, being under 40s. Holt Ch. J. You come too late, after execution executed; you may take your action. See Stat. 22 & 23 Car. 2. cap. 9. ad finem. Comb. 222. Mich. 5 W. & M. B. R. Phelps v. Rainer.

27. In trespass for *digging in his close* &c. there shall be no costs; contra if that had been a carrying away. Hill. 7 W. 3. B. R. Reynold v. Osborn.

28. In trespass for entering his close, and *throwing down so many perch of hedges, no costs*; contra if that had been a carrying away. Hill. 8 W. 3. Franklin v. Jolland.

[332] 29. 8 & 9 W. 3. cap. 10. s. 3. *In all actions of waste and actions of debt upon the statute for not setting forth tithes, wherein the single value or damage found by the jury shall not exceed 20 nobles, and in all writs of scire facias and prohibitions, the plaintiff obtaining judgment of execution after plea pleaded, or demurrer joined, shall likewise recover his costs.*

30. It is the course of the Court of Exchequer, that plaintiffs shall have costs in Equity, where they recover, without any order for them. MS. Tab. 1702. Warburton v. Warburton.

31. If a bill in equity be brought for a partition, no costs can be had on either side, because it is an *amicable suit*; so it is at law; per the Master of the Rolls. Pasch. 7 Ann.

32. Constant course of the Court, where *mutual account* is decreed, to *reserve costs till after the report*, that the Court may have it in their power to punish the wrong doer. MS. Tab. Feb. 16th 1709. Rider v. Bayley.

33. In *ejectment* of lands in Kent, there was a *verdict Pro Quer.* as to part, and a *verdict for Lord Suffex* for some lands in possession, and several other defendants named in the rule with my Lord Suffex were acquitted; as to several other defendants in other rules there was a verdict that they were Not Guilty; per Cur. upon 8 & 9 W. 3. cap. 10. as to all these defendants

dants named in the rule where all were acquitted, they must have their costs; as to the other defendants named in the rule with my Lord Suffex, where part is found against them though acquitted, they are not to have their costs, and the Court certified, that there was a reasonable cause for making such persons defendants on a trial at Bar. Mich. 9. Ann. Regim. B. R. Lord Suffex's Case.

34. *Trespass for breaking his close, and for breaking down of his rails, pro sensura, and for spoiling of his locks thereto affixed;* costs denied. Trin. 11 Ann. B. R. Mabbot v. Whitnell.

35. In case for words, or an *assumpsit* where damages are taken on one promise only, or one set of the words, costs are given generally; so on a writ of enquiry on one promise (where two are in the declaration, and to one a demurrer &c. & judic. pro quer. and non assumpsit to the other, and a noli prosecute &c. the damages and costs of the suit shall be general. Hill. 11 Ann. B. R. Baker v. Campbell, for the costs of suit are the same whether the 1st or 2d promise be not performed.

36. Costs shall follow the event of an account, but if the account be intricate and doubtful there shall be no costs. MS. Tab. March 8th, 1716. Pitts v. Page.

37. Held by Judge Eyre in Essex, Lent Ass. 1719, that where a *trespass was wilful* the Judge would certify, though no malice proved, and so was the practice.

38. And also, that where *son assault is pleaded* there is no occasion for a certificate, because it is admitted by the plea.

39. Upon a writ of enquiry executed after judgment by default in a prohibition, plaintiff shall have his costs; adjudged in C. B. and affirmed in error. Comyns's Rep. 335. Mich. 6 Geo. 1. Bettyson v. Savage.

(C) In Replevin.

[333]

1. **R**EPLEVIN against two; the one came and avowed for himself, and confessed for his companion for rent arrear; the plaintiff *riens arrear*, and so to issue, and the plaintiff prayed process against the other; per Hill, he is out of the court, and you shall recover your damages for all against him who pleaded &c. Nota. Br. Replevin, pl. 24. cites 21 E. 3. 20.

2. In replevin, the defendant claimed property, upon which they were at issue, and found for the plaintiff to the damage of 20 marks, and the taking of a cow; the defendant prayed that the plaintiff might not have recovery of the damages for the cow, till the beasts of the defendant, which the plaintiff has in *Withernam*, of which Cape issued against the plaintiff, are delivered; sed non allocatur. Per Terwhit upon this process against the plaintiff for the *Withernam* the defendant shall recover damages against the plaintiff for the detinue of the *Withernam*;

If the defendant claims property in court which is found against him, the plaintiff shall recover all in damages. Br. Replevin pl. 15. cites 7 E. 4. 27.

nam; quære, for by the Reporter a man cannot recover damages *without original*. Br. Damages, pl. 50. cites 11 H. 4. 10.

3. In *replevin*, the defendant justified as bailiff; the plaintiff pleaded jointenancy in the land with J. M. and day was given in the same term, and at the day the Court demanded the defendant, who made default, and the plaintiff recovered damages 4l. because he had confessed the taking, and did not maintain it. Br. Default, pl. 24. cites 14 H. 4. 2.

Ibid. in the new notes there (a.) says, 'see 17 Ed. 3. 8. b. 45 Ed. 3. 9. But if the other had

4. If a man takes cattle for *damage-feasant*, and the other tenders amends, and he refuses it &c. now if he sues a replevin for the cattle, he shall recover damages only for the detaining of them, and not for the taking of them; for that the same was lawful, and therefore no return shall be. F. N. B. 69. (G.) cites 22 H. 7. 30. Contra in Case of Trespass.

them in pound before amends tendered, it is then too late to tender the amends, and on the avowry the defendant shall have no return till a new tender, and then the party may have detinue. Quære 13 H. 4. 17. 14 H. 4. 4. And if he tenders before the taking, the taking is tortious, 7 Ed. 3. 8. and if immediately on the taking the detainer is so, and he may recover damages for it, and no return shall be awarded to the lord. 45 Ed. 3. 9.

So if the defendant claims property, or says that he did not take &c. if in the mean time the beast die, or are sold, so that he cannot have a return, he may recover all in damages, if it be found for him. Ibid in the new notes there (c) cites 7 H. 4. 18. — The defendant claimed property in C. B. and they are at issue, and it was found for the plaintiff, it seems he shall recover the value of the thing taken, and his damages. Ibid. cites 11 H. 4. 10. — If the defendant makes consuance, and avows, and after day given over makes default, the plaintiff shall recover his damages by taxation of the court. Ibid. cites 14 H. 4. 2.

5. And in a *replevin*, if the plaintiff declares, that the defendant yet has, and detains the cattle, and the defendant appears, and afterwards makes default, the plaintiff shall have judgment to recover all in damages, as well the value of the cattle, as damages for the taking of them, and his costs. F. N. B. 69. (L.) cites M. 8 H. 8. Rot. 108.

6. 7 H. 8. cap. 4. §. 3. Every avowant, and other person, that makes avowry or consuance, or justifies as bailiff in replevin or second deliverance for rent, custom, or service, if the plaintiff be barred, shall recover damages and costs.

[334] 7. In second deliverance the plaintiff was nonsuited, and the defendant prayed his damages and costs by the Statute 7 H. 8. cap. 4. quod nota; and the statute is, that where he is barred or the matter found against him, there the defendant shall recover damages; quod nota. Br. Second Deliverance, pl. 1. cites 19 H. 8. 8.

8. If the avowant recovers in replevin he shall not recover damages for the time mean, but only for the trespass done at the time of the taking; per tot. Cur. and said that it had been always taken so. Dal. 52. pl. 23. Anno 5 Eliz. Anon:

Cro. E. 329. pl. 4. Haselop v. Chaplin. Trin. 36 Eliz. S. C.

9. Error of a judgment in replevin, where the defendant avowed for an affray, and had a return thereof awarded, with costs and damages; error was assigned, for that no costs and damages are given in this case, either by the Statute 7 H. 8. or

as 21 H. 8. for they are given only in avowries for rents, customs, services, or for damage feasant; the Court conceived that it was error, but would advise, et adornatur. Cro. E. 257. pl. 36. Mich. 33 & 34 Eliz. B. R. Haskip v. Chaplin.

this case was moved again and divers precedents were shewn out of C. R.

that always since the statute damages and costs had been given to the avowant for amercements in leets, and for heriots and other cases not mentioned in the statute. And the justices conceived that their course being to fine the statute, the law shall be construed to be so; and so inclined in their opinion. But the judgment was reversed for a fault in the replevin. — Ow. 13. Haskwood's Case S. C. accordingly.

10. If a man has judgment in the second deliverance there shall be return irrepleviable and he shall recover damages. Goldsb. 185. pl. 126. Hill. 43 Eliz. Anon.

11. In replevin the defendants avowed for an amercement of 30l. assessed in the sheriff's town for not repairing of a way, which by custom they ought to repair; it being found for the avowants, the jury assessed costs and damages. It was objected, that the costs and damages ought not to be given by the Statute of 21 H. 8. [cap. 19.] which did not extend to amercements in turns and leets, but only to rents, customs, and services. It was answered, that the costs and damages were well assessed, and cited 8 Rep. 38. Griesley's Case, and Joyner's Case, that the avowant, for an amercement in a leet, should have costs and damages, but no judgment appears. Mo. 893. pl. 1257. Hill. 14. 1 Jac. C. B. Loder v. Samuel. Cro. J. 580. pl. 7. Samuel v. Hoder. S. C. The Court at first were in much doubt thereof, but afterwards on consideration of the statute, which gives costs in every action where the

plaintiff should have costs, they held the avowant should have costs, but advised him to release his damages, and take his judgment for his costs, and to have return, and so it was adjudged, and cites like judgment given 38 Eliz. Chapley v. Hartley; and Mich. 44 & 45 Eliz. Mackword v. Shepherd. — a Roll. Rep. 74. S. C. adjudged that the plaintiff should have costs, but the Court doubted whether he should have damages, and therefore ordered him to release his damages.

12. Replevin; The defendant avows for 36l. rent for a year and half, being 25l. [24l.] by the year; the plaintiff pleads payment of 12l. and another issue was brought for the 24l. and for the 1st issue it was found for the plaintiff and damages and costs taxed by the jury; but it was found against the plaintiff for the 2d issue, and now moved, that the juries finding of costs and charges for the plaintiff is void; for when part is found for the avowant, he shall have return, and damages and costs, and the return shall be for the defendant, where any part is found for him; wherefore it was adjudged accordingly. Cro. J. 473. pl. 3. Pasch. 19 Jac. B. R. Dent v. Pario.

S. C. cited a Lutw. 1194. in Case of Winnard v. Foster, Trin. 3 W. & M. C. B. But the reporter says that in the report of this Case (as he supposes) a Roll. Rep.

47. by the name of Denton and Parlon's Case, it is said, that Whitlock moved to have judgment for the costs and damages found by the jury for the plaintiff, according to 2 H. 6. 1. and that Whitlock J. answered him, that this he could not have, because the avowant is actor, and he is as a plaintiff in other actions, and he had good cause of taking the benefit; that at the time of the said case of 2 H. 6. 1. no law was made which gave the avowant costs till 21 H. 8. But Doderidge bid him take his judgment at his peril; for that they would not direct him. And Sergeant Lutwich adds, that in Browal. 179. it is expressly said, and with a note in margin, that upon avowry for rent the plaintiff for part pleaded payment, and for the other an accord, and the one issue is found for the plaintiff, and the other for the defendant; the plaintiff shall recover his costs and damages, and the defendant shall have judgment of returno habendo, [335] and no costs and damages; but that the reporter [Browalow] thought otherwise, if there are two several avowries; for then they shall recover costs and damages on both sides; and Sergeant Lutwich

Lutwich says it is probable that the case intended by Brownlow was the Case of Denton v. Parsons, reported in a Roll. Rep. 37. for it agrees therewith in the fact of the case, and then the Serjeant adds a copy of the judgment itself as entered upon the record.

13. *Executor shall have costs in replevin; resolved.* 2 Roll Rep. 457. Trin. 22 Jac. B. R. Farnell v. Keightly.

Jo. 421. pl.
9. Hill. 14
Car. and
434. Trin.
25 Car.
B. R. James
v. Tutney
S. C. the
Court divid-
ed. — Mar. 28. pl. 64. S. C. accordingly.

14. In replevin of a *distress* taken for a penalty forfeited to the lord of the manor for breach of a bye-law; one question was, whether damages and costs should be given to the defendant upon the Statute 7 H. 8. cap. 4. and 21 H. 8. cap. 19? but it was not resolved. Cro. C. 497. pl. 2. Pasch. 14 Car. and 532. pl. 11. Hill. 14 Car. B. R. James v. Tutney,

15. *A nomine pæna* is an uncertain thing, and comes not within the Statute of 21 H. 8. touching *avowries* as a rent-charge does, which is certain. Arg. Sty. 4 Hill. 21 Car. B. R. in Case of Remington v. Kingerby.

16. In replevin the defendant avowed for a rent-charge, and the plaintiff perceiving that the jury would find for the defendant, being called, *when they were ready to give their verdict, would not appear*; however, the Court took the verdict; which found for the defendant, and assessed damages and costs. 2 Sid. 155. 1659. B. R. Lacy v. Berry.

17. In replevin, the writ was in the *detinet*, and the plaintiff declared of a taking goods at the parish of St. M. &c. in a place there called Maiden-Lane, and that *ea injuste detinuit* &c. The defendant said, that the place contained a messuage with the appurtenances in the parish of St. P. &c. and that H. M. was seised in fee thereof, and demised it to the defendant for 21 years, and that the defendant demised it to James Peddy for a year at the rent of 281. payable quarterly, and avowed for a quarter's rent. This avowry was held to be ill without question, because the caption of the *heasts* in the count ought to be traversed, and cited 21 E. 4. 64. 9 H. 6. 39. But exception being taken to the variance &c. *detinet* in the writ and *detinuit* in the count, they agreed to amend on both sides, and so that point was not resolved; but Serjeant Lutwich says it seems a material variance, for in the *detinet* the plaintiff shall recover as well the value of goods, as damages for the taking, and cites F. N. B. 69. (L) and Co. Ent. 610, 611. But when writ and count are in the *detinuit*, he shall only recover for the taking, because this implies that the plaintiff had his goods again, and cites Hill. 14 E. 2. 421. 2 Lutw. 1147. 1150. Mich. 2 Jac. 2. Petree v. Duke.

1 Salk. 205.
S. C.

18. Plaintiff in replevin was *non suit*, and on error in B. R. *Judgment affirmed*. Defendant shall not have costs, because he is not within any of the statutes as to delay of execution, and statutes that give costs shall never be extended beyond the letter; for costs are in the nature of a penalty. Carth. 179. Hill. 2 & 3 W. & M. in B. R. Coan v. Bowles.

19. In

19. In replevin, the defendant avowed and the plaintiff being nonfuit brought a writ of second deliverance, whereupon it was moved to stay the writ of enquiry of damages; et per Cur. this is a superfedas to the retorno habendo, but not to the writ of enquiry of damages; for these damages are not for the thing avowed for, but are given by the statute of 21 H. 8. cap. 19. as a compensation for the expence and trouble the avowant has undergone. Salk. 95. pl. 6. Trin. 13 W. 3. B. R. Pratt v. Rutledge. [366]

20. No costs in replevin for the defendant, if the plaintiff confesses the plea in abatement to be true. 2 Lord Raym. Rep. 788. Trin. 1 Ann. Smith v. Walker and Nois.

21. In replevin the plaintiff declares for the taking of his cattle in a certain place called B. The defendant pleads in abatement, that he took them in a certain place called C. absque hoc quod cepit in præd. loco vocat. B. prout &c. & pro retorno habendo he avows &c. The plaintiff confessed the caption to be in C. and thereupon the avowant had judgment that the writ should abate, and for the return of the cattle. It was resolved by the Court, that would not carry costs; for the statute 21 H. 8. cap. 19. does not extend to this case, but gives costs only when the plaintiff is nonsuited, and the Statute of 7 H. 8. cap. 4. gives costs only when the plaintiff is barred; but here the plaintiff is neither barred nor nonsuited, but the writ only abates; and he may have a new writ, and is not put to his second deliverance. Comyns's Rep. 122. Trin. 1 Ann. in B. R. Smith v. Walgrave.

(D) In a Writ of Error.

1. 3 H. 7. cap. 10. IF a person bound by a judgment before execution sue a writ of error to reverse it, and the judgment be affirmed, the writ discontinued &c. the defendant shall recover costs and damages.

19 H. 7. cap. 20. com- firms this act, and enacts that from thenceforth the same shall be put in execution.

2. In error of a judgment in C. B. in formedon the judgment was affirmed; and it was moved to have costs and damages for the delay of execution upon the Statute H. 7. cap. 10. whereupon it was doubted, because it was in a formedon in which (being the principal action) no costs were allowable; but notwithstanding, upon considering the statute, which is general, viz. "That if a writ of error was brought before execution, and the judgment be afterwards affirmed, the demandant or plaintiff shall have costs and damages," and it mentions not any action, they all resolved that costs and damages shall be given for delay of execution, though in the first action no damages were recoverable; and judgment accordingly. Cro. E. 616, 617. pl. 1. Mich. 40 & 41 Eliz. B. R. Graves v. Short.

S. P. cited by the reporter in a Nota. Lev. 146. in Case of Winne v. Loyd.

3. In all cases of writs of error before the Judges and Barons in the Exchequer Chamber, they, at the prayer of the party, shall award costs and damages to the plaintiff in the first suit for his delay and vexation, and this by the Statute 3 H. 7. cap. 10. But if the plaintiff in the writ of error was plaintiff in the first suit, then no costs and damages shall be given in case where the plaintiff or defendant has execution of the first judgment 2 And. 123. pl. 68. Anon.

3 Rep. 100.
b. Penruddock's Case.
S. C. but
S. P. does
not appear.

— S. C.
cited in a
note of the
Reporter.
Lev. 146.
at the end
of the Case of Winne v. Lloyd.

4. Costs are allowable in every case where a writ of error is brought before execution sued; it is the discretion of the Court what costs shall be allowed; and though the matter upon the writ brought was doubtful, yet there was not any case, but that costs are allowable; but the costs must not be denied by the Court, and therefore the plaintiff in the writ of error was awarded to pay costs. Cro. E. 659. pl. 4. Pasch. 41 Eliz. B. R. Penruddock v. Clark.

[337] 5. Judgment was given for the defendant in C. B. and that judgment was affirmed, and 10l. costs given in B. R. upon the Statute of 3 H. 7. It was moved, that the costs were not grantable, for the statute is where judgment is given against the defendant, and he to delay the execution brings a writ of error, and the judgment is affirmed; but here the judgment is given for the defendant in C. B. so no execution was to be awarded there against him; and although the plaintiff brought the writ of error, and the judgment be affirmed, yet it is out of the statute; and of that opinion was the Court, wherefore a superedeas was awarded to stay execution for the costs. Cro. C. 401. pl. 10. Hill. 9 Car. in B. R. Bawton v. Nichols.

6. A judgment in formædon in the remainder being affirmed upon a writ of error brought in this Court, it was moved that the defendant in the writ of error, being delayed in the execution, might, according to the Statute 3 H. 7. have costs. Resolved, that because there were no costs nor damages recovered or allowed in the first action, so that no execution is delayed but only for the land, that no costs were allowable by that statute. Cro. C. 425. pl. 15. Mich. 11 Car. in B. R. Smith v. Smith.

If admini-
strator
brings a
writ of
error he
shall not

7. 13 Car. 2. cap. 2. s. 10. If any person shall sue any writ of error for reversal of any judgment given after verdict in any of the Courts aforesaid, and the judgment be affirmed, such person shall pay the defendant in error double costs.

pay any costs, though the judgment be affirmed; for he is not a person within the intent of the Statute Carth. 281. Trin. 5 W. & M. in B. R. Gale v. Till. — 3 Lev. 375. S. C. and the Court seemed to be of the same opinion, but would advise; and Levins of counsel for the plaintiff, in the original action, being satisfied with the opinion of the Court, never moved it afterwards. — 4 Mod. 244. S. C. held accordingly.

8. *Sec. 11. This act shall not extend to any action popular, nor to any action upon any penal law, except debt for not setting out tithes, nor to any indictment, presentment, inquisition, information, or appeal.*

9. A writ of error was brought to reverse a common recovery in Wales, and judgment in the common recovery is affirmed; and now Williams moved for costs for the defendant in the writ of error, according to 3 H. 7. cap. 10. and although there is not any delay here according to the words of the statute, yet this is to be intended where execution may be, but here is no execution to be had; but the Court denied to give costs, because there is not any delay of execution, and at the common law there were no costs in a writ of error. Raym. 134. Trin. 17 Car. 2. B. R. Winne v. Lloyd.

Sid. 213. pl. 12. S. C. but S. P. does not appear.— Lev. 146. S. C. and per Cur. no costs shall be given on the writ of error, because no costs or

damage in the original action.—It is said, that Hill. 11 Geo. 2. B. R. in Case of FERGUSON v. RAWLINSON, it was held, that any delay is good reason for costs, and so this case was denied.

10. A writ of error on a judgment in C. B. in Ireland was affirmed in B. R. there, and costs awarded to the defendant in error; a writ of error was brought here, and the error assigned here was, that costs ought not to have been awarded upon such affirmance, because our statutes do not extend to actions there. It was adjudged that the judgment in B. R. in Ireland be reversed quoad the costs only. Sid. 357. pl. 11. Hill. 19 & 20 Car. 2. B. R. Exham v. Coniers.

11. A writ of error was brought in Cam. Scacc. on a judgment in B. R. after execution executed, and therefore it was moved, that the plaintiff be discharged of costs; per Cur. this is not within the Statute 3 H. 7. cap. 10. because no execution is hereby delayed, and also the Exchequer Chamber gives costs. 2 Keb. 391. pl. 79. Trin. 20 Car. 2. B. R. Harding v. Randall.

12. B. had judgment in an ejectment in C. B. and execution of his damages and costs. F. brings error, and the judgment is affirmed. Whereupon B. prays his costs for his delay and charges, but could not have them; for no costs were in such case at the common law, and the Statute of 3 H. 7. cap. 10. gives them only where error is brought in delay of execution; so 19 H. 7. cap. 20. And here, though he had no execution of the term, yet he had it of his costs. Vent. 88. Trin. 22 Car. 2. in B. R. Foot v. Berkley.

[338] Court said, there was no reason for such distinction. Hill. 11 Geo. 2. B. R. Ferguson v. Rawlinson.

13. Saunders on 3 Cr. prayed costs in a writ of error on a judgment in a quare impedit on verdict against one, and on a demurrer by the other, damages on 13 Car. 2. cap. [2. stat. 2.] that where judgment on verdict is given, the party shall have double costs; the Court agreed on 3 H. 7. cap. [10.] that if no execution were had of the presentation or damages, the party shall have costs for delay of execution in any part, but on Cro. C. 425. Smyth v. Smyth, no costs can be after execution executed, because no delay; the late Statute of 13 Car. 2. is

only as to the security; and by rule of Court costs were taxed nisi. 2 Keb. 882. pl. 60. Hill. 23 & 24 Car. 2. B. R. Bucke v. Aston.

14. Holt said, if the *defendant pleads in bar of the writ of error, and has judgment, that the plaintiff be barred*, then the defendant is to have no costs; but where the judgment is affirmed, the defendant is to have costs upon the Statute of 3 H. 7. cap. 10. Comb. 3. 3. Hill. 6 W. 3. B. R. Fufee v. Rowe.

15. Where a writ of error is brought, if the *party enters a non prof.* no costs can be had; for the statute gives costs in a writ of error only where it is *in dilations executionis*; per Holt Ch. J. 5 Mod. 67. Mich. 7 W. 3. in Case of Winchurch v. Masely.

16. 8 & 9 W. 3. cap. 10. [11.] *If after judgment for the demandant the plaintiff or demandant shall sue a writ of error, and the judgment shall be affirmed, or the writ of error discontinued, or the plaintiff nonsuit therein, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by capias ad satisfaciendum, fieri facias, or elegit.*

17. No costs are to be had on a writ of error where the judgment is reversed. 8 Mod. 314. Mich. 11 Geo. 1. Wivell v. Stapleton.

18. But it had been *otherwise* if the judgment had been affirmed. 8 Mod. 314. Mich. 11 Geo. 1. Wivell v. Stapleton.

19. Where judgment was against two, and a writ of error is brought by one, and quashed, the defendant shall have costs. 8 Mod. 316. Mich. 11 Geo. Cowper v. Ginger.

(E) On Demurrer.

1. **A**T this day, if a demurrer be *adjudged against the plaintiff*, he shall not pay costs, but *shall only be amerced*. Jenk. 161. pl. 7.

2. It was agreed upon the Statute 23 H. 8. cap. 16. [15.] that if *in debt* there is a demurrer which goes to the *action* which is *adjudged against the plaintiff*, the defendant shall have costs, though it be out of the words of the statute, and that so is the course of the Court, and had been always allowed, *but if the demurrer goes to the writ only*, and it is adjudged against the plaintiff, the defendant shall not have costs. And. 117. pl. 163. Hill. 26 Eliz. Anon.

[339] 3. By Statute 17 Car. 2. cap. 7. s. 3. *If upon an avowry in any of the Courts of Westminster, judgment be given on demurrer for the avowant, or him that makes consuance for rent, he shall recover costs.*

This statute does not extend to judgment 4. 8 & 9 W. 3. cap. 10. [11.] s. 2. *If any person shall prosecute in any court of record any action, wherein upon demurrer judgment shall be given against such plaintiff or demandant, the defendant*

defendant or tenant shall have judgment to recover his costs, and have execution for the same by capias ad satisfaciendum, fieri facias, or elegit.

given for defendant upon a demurrer to a plea in

abatement; per Holt Chief J. 12 Mod. 523. Trin. 13 W. 3. Anon.

5. *Assumpsit*; the defendant pleaded his privilege as an officer of the Exchequer in abatement, and the plea being held good upon demurrer, there was judgment, quod billa cassetur; et per Cur. it was held upon the 8 & 9 W. 3. cap. 11. That the defendant shall have no costs, for the act extends only to demurrers in bar, and not in abatement, because it speaks of suits which are vexatious, which does not appear to the Court on pleas in abatement, but on demurrers in bar, where the Court fees the merit of the cause, it does, and it would be very hard if the defendant should have costs against the plaintiff in such a case, when the plaintiff could have none against the defendant, though he should have had judgment, quod respondeat Ouster. 1 Salk. 194. pl. 3. 10 W. 3. B. R. Thomas v. Lloyd.

Ld. Raym. Rep. 336, 337. S. C. and S. P. held accordingly. — Comb. 482. Toms v. Loyd. S. C. accordingly, and the Court said, that they could not take it for a vexatious suit where the defendant has judgment

upon a plea in abatement only. — 12 Mod. 196. S. C. held accordingly, and that it must be understood of a demurrer where there is a judgment final. — S. P. and the statute meant only to give costs, where the merits of the cause was determined upon the demurrer. 1 Salk. 194. pl. 4. Mich. 2. Ann. B. R. Garland v. Extend. — 6 Mod. 88. Garden v. Exton, S. C. per Cur. accordingly; for if there was judgment of respondeat ouster for the plaintiff, the defendant should have no costs; and cited the Case of Thomas v. Floyd where the same had been resolved before. — 1 Ld. Raym. Rep. 992. Garland v. Exton, S. C. and S. P. agreed.

6. 4 & 5 Ann, cap. 16. Gives costs upon insufficiency of matters in demurrers, and on pleas unless the judge certify a probable cause.

(F) Where Defendant, or one or more of the Defendants shall have Costs.

1. 23 H. 8. *If a plaintiff be nonsuit, or overthrown by trial in cap. 15. any action of trespass, debt, covenant, detinue, account, action upon the case &c. the defendant shall have costs jet by the Judge of the Court.*

See tit. Nonsuit. (F) pl. 4. this statute more at large, and the notes

there. — The words of the statute are confined to wrongs done, or debts, or damages due to the plaintiff or plaintiffs, and therefore an executor or administrator is not within the statute, and then the plaintiff pays no costs; for the testator is, as it were, plaintiff by him, and he is not to recover to his own use; but is trustee for the creditors. Gilb. Hist. of C. B. 217. — So an infant commencing his suit by guardian, there can be no malice supposed in him. Gilb. Hist. of C. B. 218.

2. 24 H. 8, cap. 8. No costs shall be awarded to the defendant in action brought by the king.

3. Where an original is discontinued, the defendant shall not have costs; but after a discontinuance in a latitat, the defendant shall have costs by the Statute 8 Eliz. cap. 2. Le. 105. pl. 142. Mich. 30 Eliz. C. B. in Case of Bear v. Underwood.

4. *Assumpsit*; a *special verdict* was found, and thereupon adjudged for the defendant; and it was now moved, whether the defendant should have costs by the Statute of 23 H. 8. cap. 15. for it was alleged, that that is to be intended where the plaintiff is nonsuited, or a general verdict passes against him, so as it appears that he has not any cause of action; but the Court ruled, that he should have costs; for a *special verdict* is as well a verdict for him, for whom it is found, as a general verdict, and there is not any difference, when judgment is given thereupon, but it is as if a general verdict had been given for the defendant, wherefore &c. Cro. E. 465, (bis) pl. 18. Pasch. 38 Eliz. B. R. Alfop v. Cleydon.

Ibid. cites
Pasch. 4 Jac.
The Attorney
General
v. Willoughby &
al. like
Point. —

5. Where there were *several defendants*, and only one was sentenced, the other had costs, because not charged with the offence for which the sentence was, but with the other offences of which they were acquitted. Mo. 770. pl. 1064. Mich. 3 Jac. in the Star Chamber. Dag v. Penkevell.

Noy. 101. Doydidge v. Penkvoll. S. C. accordingly.

6. The plaintiff brought two actions upon 2 E. 6. for treble damages &c. and he is nonsuited in one action, and discontinues the other, and held by the whole Court that the defendant shall not have costs by 8 Eliz. cap. or by 4 Jac. cap. 3. because if the plaintiff had recovered he should have recovered but treble damages only, by the statute. Noy. 136. Mich. 7 Jac. B. R. Cox v. Small.

7. Replevin against A. and B. A. pleaded *non cepit*, and it was found against him. B. avowed the taking for good cause, and it was found for him. It was moved for costs against A. but [it was answered,] that no costs ought to be given against him, because, the other issue being found for B. his companion, shews that the plaintiff had no cause of action, and said it was so held within these two years in B. R. in Case of DENTON v. BLENCHEVILLE, and the Court now seemed of the same opinion. 2 Roll. Rep. 140. Hill. 17 Jac. Br. R. Anon.

Hutt. 78.
Townley v.
Steel S. C.
the Court
was divided.

8. In a *ravishment of ward*, brought by an executrix of her own possession; the issue being upon the tenure, and found for the defendant, the question was, upon the Statute 4 Jac. cap. 3. if the plaintiff should pay costs? Three justices held that the defendant should not have costs, but Yelverton e contra. Cro. C. 29. pl. 3. Hill. 1 Car. C. B. Peacock v. Steers.

Mar. 9. pl.
25. S. C.
but S. P.
does not
appear.

9. Error; after a *special verdict*, and argued at the bar, there was a discontinuance entered by the plaintiff, as it was agreed he might; it was moved, that costs might be assessed for the defendant; but the Court doubted whether costs might be assessed, because there was no verdict given in the case. Cro. C. 575. pl. 19. Hill. 15 Car. B. R. Oxford (Earl of) v. Waterhouse.

10. In covenant against two the plaintiff has judgment by default against one, and the other pleads performance, which is found

found for him; resolved, that the defendant shall have costs upon the verdict against the plaintiff, and the plaintiff shall not have either costs or damages against the other defendant. Lev. 63. Pasch. 14 Car. 2. B. R. Porter v. Harris.

11. 4 Jac. 1. cap. 3. *If the demandant or plaintiff be nonsuit, or overthrown by lawful trial in any action whatsoever, the defendant shall have costs.* See tit. Nonsuit (P) pl. 8. this Statute and the notes there.

12. In a *warrantia chartæ*, the count was, *that the defendant enfeoffed him, and covenanted that he was seised of a good estate in fee, and had power to convey &c. and that the plaintiff should quietly enjoy it from all former grants &c. except a term of 20 years to one B. of which seven only were to come, and that the defendant would warrant the premisses to him against all men;* [341] *and says, that at the time of the feoffment there were more than seven years to come of the said term, and that one C. having title, entered and expelled the plaintiff, and the defendant refused to warrant the tenements to him. Upon issue, that there were not more than seven years to come of the said term, the defendant had a verdict; and it was moved, that he ought to have costs upon the Statute 4 Jac. cap. 3. which gives costs to the defendant in all cases where the plaintiff would have costs if the verdict be for him, and by the Statute of Gloucester cap. 1. costs are given in all cases where damages are to be recovered, and in a warrantia chartæ the demandant shall recover damages; and though in this case of eviction of a term an action of covenant and not a warrantia chartæ had been the proper remedy, yet since the defendant will accept judgment in this action, he ought to have his costs; but the reporter says quære de ceo, for if the action does not lie, judgment ought to be against him though the verdict is for him.* 3 Lev. 321. Mich. 3 W. & M. in C. B. Thomas v. Bligh.

13. Where the *plaintiff discontinues with the leave of the Court*, the defendant ought to have his costs (as upon a nonsuit) which cannot be moderated; per Holt Ch. J. Comb. 299. Mich. 6 W. & M. in B. R. Poole v. Purdy.

14. It was moved, that *one defendant was put in by fraud on purpose that he might make no defence*, but to secure the plaintiff from paying costs, and therefore *prayed, that if the plaintiff were nonsuit, or the other defendant had a verdict, he might have his costs.* Holt Ch. J. I fear we cannot do it in any case, unless in *ejectment*, and there we will not compel the defendant to confess lease, entry, and ouster, unless the plaintiff consents. Comb. 364. Pasch. 8 W. 3. in B. R. Wilcocks v. Powell.

• 15. 8 & 9 W. 3. cap. 10. [11.] s. 1. *Where several persons shall be defendants in trespass, assault, false imprisonment, or electione firmæ, and any of them shall be acquitted by verdict, he shall recover costs &c. as if a verdict had been given against the plaintiff, and acquitted all the defendants, unless the Judge before whom &c. shall, immediately after the trial, in open court certify upon the record, under his hand, that there was a reasonable cause for making such person or persons defendants,*

In a *scire
facias* a-
gainst bail
which was
discontinued

16. S. 3. *If the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs.*

by an ill return, being made to be on a Sunday, now costs was prayed, this being a discontinuance within 8 & 9 W. 3. for the words there are, where the party suffers a discontinuance. Holt. Ch. J. this is only where the party enters a discontinuance, and not where it is only by slip of the clerks (as here) Prime v. Mason. Mich. 6. Ann. — 11 Mod. 120. pl. 6. Trin. 6 Ann. B. R. S. C. the return was die lune in tres septimanas sanctæ Trin. the Court held it a void writ; for there is no such day, it being on a Sunday.

17. *Four persons were arrested by a latitat in trespass; three of them appear and put in bail; and for want of a declaration in time take three several non proffes against the plaintiff, and upon a motion to set those non proffes aside for irregularity, it was held per Cur. to be well enough; for by the 8 Eliz. every person is to have his costs &c. though at the first there was some doubt with the Court, that there ought to have been one non profs only, for until the declaration it was a joint action, whereby the plaintiff might sever his demand, and make several declarations.* Trin. 8 Ann. B. R. Anon.

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See tit.
Actions Qui
tam &c.
(A. 8)

18. An information was brought at the assizes against the defendant for non-residence, which being removed into B. R. by certiorari, the defendant demurred for want of jurisdiction; and upon argument judgment was given for him; whereupon it was moved for costs upon the Statute of the * 18 Eliz. 5. and a Case of Cannon and Gooding qui tam v. Nixon. Mich. 6 Geo. 1. was cited, whereupon an information on the Statute of the 1 & 2 P. & M. cap. 7. for selling wares by retail the defendant demurred, C. for the want of a joinder in demurrer on the part of the informer, costs were ordered for the defendant. On the contrary it was insisted, that this case was not within the statute, there having been no verdict, nor any judgment upon the merits; but the Court agreed it was clearly within the words and meaning of the statute, for judgment upon demurrer is certainly a judgment of law, and if informers should be allowed to bring informations in courts which have no jurisdictions, without the punishment of costs, it would let in great vexation, and the statute be thereby wholly evaded; whereupon it was referred to the Master &c. Mich. 13 Geo. 2. B. R. Garland qui tam v. Burton.

19. The plaintiff had brought two ejectments for the same premises in C. B. but countermanded notice of trial just time enough to prevent his paying of costs, and then brought another ejectment in this Court, upon which defendant moved that proceedings might be stayed in the last, till the costs of the two former had been paid; but the Court would not do it, because the countermand being proper, no costs are legally due; but at another day the Court finding it to be a vexatious proceeding, granted a rule to stay the last ejectment till the former were discontinued, and so the plaintiff to make his election which he would proceed upon; and it being objected that the defendant, if he pleased,

pleased, might have carried down either of the former to trial, they said, they would not oblige a defendant in ejectment to hazard his possession by bringing on the cause by proviso; and the Ch. J. cited the Case of *FENWICK v. LORD GROSVENOR*, Salk. 258. where a defendant in ejectment, having judgment against him, brought a writ of error, and, pending that, a new ejectment, which was not allowed of, and was called by Lord Holt a riding ejectment. Mich. 12 Geo. 2. *B. R. Thrustout on demand of Park & Ux. v. Troublesome*,

(G) Costs. In what Cases Defendant shall recover Costs in inferior Courts.

1. 8 *Eliz. cap. 2.* *COSTS, damages, and charges shall be awarded where the plaintiff doth delay, discontinue, or is nonsuit in the Marshalsea, and all other corporations and liberties, where the courts are kept de die in diem; but where they are not so kept, then the plaintiff must declare at the next court after appearance, unless he have longer time allowed by the Court.*

2. 16 *Car. 1. cap. 15. s. 5.* *In all cases where the plaintiffs or defendants are to have costs by the laws of this realm, the plaintiffs or defendants shall have like costs in the Stannary Courts.*

(H) What Costs; where there are several [343] Actions or Suits.

1. **W**HERE a man brings debt in the Marshalsea, or in London, or elsewhere, upon an obligation, and is longly delayed there, and nonsuited, and after takes a new suit in *C. B.* and recovers his debt, there he shall not recover his damages for the suit in the first Court; but only for the suit in *C. B.* and for the detainue &c. which is intended damage; and the first term of damages is intended costs. *Br. Costs, pl. 24. cites 2 H. 4. 22.*

2. *Where two bring assise and the one dies, by which the writ abates, and another brings another writ by journeys accounts, and recovers, he shall have the costs of the first suit, per Bigot; quod nota. Br. costs, pl. 15. cites 9 E. 4. 5.*

3. If a writ doth abate by the act of God, in a new writ by journeys accounts he shall have costs for the first, and the proceedings thereupon; but if the first writ be faulty in default of the demandor or plaintiff, in the 2d writ the demandor or plaintiff shall have no costs for such an insufficient or faulty writ. 2 *Inst. 288.*

4. In *trover* in *B. R.* the Court were divided in opinion as to the sufficiency of the declaration, and continuing divided upon several

See Keilwa 127. b. pl. 92. Casus incerti Temporis. Anon. S. P.

Mar. 12. pl. 32. S. C. but S. P. does not appear.

several motions, *the plaintiff for expedition consented that judgment be entered against him*, and so it was, *quod nihil capiat per billam*; and then *the plaintiff began a new action in C. B. and amended that fault in his declaration, and had judgment by confession of the action, and only 3l. damages* given by a London jury, and thereupon Hendon moved in this Court to have costs in his former action, but because the verdict was found for the plaintiff, and upon exception to the declaration judgment was given against him; the Court held that no costs should be given. Cro. C. 545. pl. 10. Pasch. 15 Car. B. R. Sir Martin Lyfter v. Home.

Mar. 24. 25. 5. A. recovered in trespass in C. B. and thereupon the defendant brought attain, and it was found against him. The defendant in the attain shall not have costs in the attain by the Statute 23 H. 8. cap. [15.] nor by any statute which gives costs for the defendant. Jo. 432. pl. 2. Pasch. 15 Car. B. R. Davies v. Bellamy.

costs the defendant shall have costs; but they were denied by the Court; for that ought to be taken in the original action, and not in case of attain; but upon the restitutur costs shall be given; but that is in the original action. — Cro. Car. 542. pl. 6. Daly v. Bellamy S. C.

If the first verdict had passed for the plaintiff, whereby he should have had costs, or if it had passed so as he brought attain, and the jurors had been attained, he should have such costs as he had in the first action, but he should not have had more costs in respect of the attain; so e converso, where the first verdict passed for the defendant, and he had costs, if the verdict be impeached by attain, or affirmed, he shall have no more costs, but only those which are given upon the first verdict. Cro. C. 542. pl. 6. Pasch. 15 Car. B. R. Daly v. Bellamy.

The lessor of the plaintiff by several rules of Court on demand ought to pay costs upon the insufficiency or skulking of the plaintiff in ejectment. Keb. 17. pl. 50. Pasch. 13 B. R. Lattam v. 6. The lessor of the plaintiff is liable to pay costs (though he shall never be forced to give security for them) but the lessor of a tenant in possession is not liable to costs, because though he may come in gratis and defend his title, yet the tenant in possession is [not] liable to costs by the law, but only by the course of the Court, unless the trial be by the lessor's means brought to the Bar, and then he shall never have a 2d trial at Bar before he has paid the costs of the former trial; but yet the Court for non payment of costs will not hinder proceedings in the country; per Cur. Keb. 106. pl. 117. Trin. 13 Car. 2. B. R. Lattam v.

Car. 2. B. R. in a nota there.

[344] 7. Upon verdict against all evidence the Court will tax costs, and will not suspend it till the new trial. Keb. 294. pl. 222. Pasch. 14 Car. 2. B. R. Davies v. the Corporation of Droitwich.

8. A verdict and other unjust proceedings in an inferior Court was set aside, and the plaintiff in that Court ordered to pay all the costs there and here. Fin. Rep. 472. Mich. 32 Car. 2, Vaulx & al. v. Shelley & al.

9. One was bound beyond sea in West Jersey to pay the plaintiff 80l. legalis monetæ prædictæ &c. Plaintiff demanded 80l. English money; but was nonsuited upon the variance, and brings a new action. B. R. will not stay the 2d action until he

he has paid the costs of the first, because the merits did not come in question on the trial on which he was nonsuited, but that was only on the variance. Lord Raym. Rep. 697. Mich. 13 W. 3. Bafs v. Firmen.

10. *Indictment for a trespass and riot*; defendant pleaded Non Cul. and the indictment was removed hither by certiorari &c. The defendant went before the Master, and costs were taxed; and now it was moved that he might go before the Master again, that the prosecutor might be considered for his charges below, the Master's taxation before being only for costs since the certiorari; et per Cur. the Master ought not to consider the costs below, but only since the certiorari, and upon it; and then it was moved to aggravate the fine; but per Cur. you ought not to aggravate the fine, after the party has been before the Master; if you do, we will set aside the taxation of costs. 1 Salk. 55. Pasch. 1 Ann. B. R. the Queen v. Sumers. 3 Salk. 104. pl. 1. S. C. accordingly.

11. If a person incloses land in a town under a custom for that purpose, and another brings an action against him, in order to try that right, and a bill is thereupon brought in order to establish the custom; if, upon an issue directed in that cause to try the custom, it is found against the defendant, yet the plaintiff shall not have the costs which were incurred in the Court of Equity, because in such case the bringing a bill was not necessary; but where 8 several persons inclose land under a custom for that purpose, another brings 8 actions against them on that account, and a bill is thereupon brought to establish the custom, and to stay the proceedings in those actions; if upon an issue directed in that cause to try the custom, a verdict is found in favour of it, the defendant shall pay the costs in equity as well as at law; for in this case the defendants at law were put under a necessity of bringing their bill to stop such multiplicity of actions, and the bringing so many was most vexatious. Barnard. Chan. Rep. 437. Pasch. 1741. Codrington v. England.

(I) Costs and Damages. In what Cases. And what Costs. Double or treble.

1. **I**N waste the plaintiff recovered his damages which were trebled, and his costs to 10 marks, which were not trebled, quod mirum, that he recovered any costs where treble damages are given by statute. Br. Costs, pl. 11. cites 5 H. 5. 13. Br. Costs, pl. 26. cites 9 H. 6. 66. per judicium, that a man shall not recover costs in

action of waste; and Brooke says, it seems that this is the best law. — Keilw. 96. a. pl. 9. Trin. 13 H. 7. S. P. in B. R. by Fineux Ch. J.

In an action of waste against tenant for life, or years, the plaintiff shall recover the place wasted, and treble damages given by Statute Gloucester cap. 5. but no costs, because no action lay against them at the common law, but the action and damages are newly given; but against the guardian or tenant in dower &c. there the plaintiff shall recover treble damages and costs also for

for that an action lay against them at the common law, and for the waste damages shall be recovered; and so are all the books that seem prima facie to be at variance well reconciled. 2 Inst. 289.

In waste, all the justices of B. R. held that the costs shall be treble in this action, according to the rate of the damages, and not according to the rate of the waste taxed. Br. Coits, pl. 18. cites 5 E. 4. 17.

2. In forcible entry the defendant pleaded not guilty, and found for the plaintiff, and damages taxed for the tort to 10*l.* and for costs of the suit 5*l.* and it was argued if he shall have costs, because in this case great damages, viz. treble damages are given by statute; and after June Ch. J. awarded that the plaintiff recover his damages treble, which amounted to 10*l.* as well for the damages which he had sustained, as for the costs of his suit; quod nota. And so see that the 5*l.* for costs were not adjudged treble, but only the 10*l.* and therefore it seems that this stands for all. Br. Coits, pl. 16. cites 14 H. 6. 13.

In an action upon the Statute of forcible Entry upon the Statute of 8 H. 6. which gives treble da-

3. In forcible entry the plaintiff recovered treble damages and costs, contrary in waste; for there are no costs; and per Paston, the reason is, inasmuch as the statute of forcible entry gives so, but the statute of waste makes no mention of costs, but only of treble damages; quod nota. Br. Coits, pl. 12. cites 19 H. 6. 32.

images, in this case the plaintiff shall recover his damages and his costs to the treble, for that he should have recovered single damages at the common law, and the statute increased them to treble, 2 Inst. 289.

Co. Litt. 257. b. S. P. in principio.—If one recovers in writ of forcible entry upon

4. In forcible entry 100*l.* damages were given, and 80*l.* was for the tort, and 20*l.* for the costs, and notwithstanding that treble damages are given by the statute, yet he recovered costs, and all were treble, viz. 300*l.* for all, quod nota. Br. Coits, pl. 14. cites 22 H. 6. 57.

the Statute 8 H. 6. by confession or by default, he shall recover his treble costs; said by the justices, Gouldsb. 12. at the end of pl. 12. Pasch. 28 Eliz. cites S. C.

5. Assise against two of two manors, the one was found a disseisor with force of one manor, and the other acquitted of the disseisin of this manor, but of the other manor he was found a disseisor, but not with force, and the other was of this acquitted, and the costs were taxed to 20*l.* and because the costs ought to be against both, for they are entire, and against him who is found disseisor with force, the costs shall be treble as well as the damages, therefore their opinion was, that the 20*l.* shall be adjudged against both in common, and 40*l.* over against him who was found disseisor with force, and so he recovered 40*l.* Br. Coits, pl. 20. cites 12 E. 4. 1.

6. In an action upon the Statute of 5 Eliz. for hunting in his park, the statute gives treble damages. It was the opinion of the justices, that notwithstanding that the statute gives treble damages, that the plaintiff should have costs also. 4 Le. 36. pl. 98. Mich. 27 Eliz. B. R. Onion's Case,

In

In trespass upon the Statute 8 H. 6. cap. 9. of forcible entry, the jury found damages 20l. and 2s. costs, and the costs were increased by the Court of C. B. to 20s. and the damages and costs being trebled, he had judgment to recover 63l. It was assigned for error, that the costs assigned by the Court ought not to be *trebled*, but only those costs which the jury assessed, sed non allocatur; for all the precedents are otherwise; and judgment affirmed. Cro. E. 582. pl. 6. Mich. 39 & 40 Eliz. B. R. Thoroughgood v. Scroggs.

8. It was resolved upon the Statute of 2 E. 6. that the statute giving treble damages, the jury cannot give other damages, and that the jury cannot give costs. Mo. 915. pl. 1294. 44 Eliz. Day v. Peckvell.

9. In an *action real, personal, or mixt*, where double and treble &c. damages are given by any statute, it has been controverted in books, whether the demandant or plaintiff shall recover costs, and whether the same shall be also doubled or trebled, which doubt and variety of opinions has grown in respect the right reason of the diversity of the law in those cases, has not been observed, which is, that *whenever any statute does increase damages to the double or treble value &c. where damages before were given*, there the demandant or plaintiff shall recover his double or treble damages and costs also, and the costs also as parcel of the damages shall be trebled. 2 Inst. 289. [346]
Gilb. Hist. of C. B. 216. S. P. — New Abr. 515. S. P. in totidem verbis as in Gilb.

10. Where damages double or treble are in an *action newly given*, where no damages were formerly recoverable, there the demandant or plaintiff shall recover those damages only, and no costs. 2 Inst. 289. S. P. because the party can have nothing more than such a new statute has already given, and that is damages only, and the Statute of Gloucester cannot operate to add costs to what is given by a subsequent statute, because the new statute must be construed from itself, which gives damages only, and therefore for the Court to give costs in such case, would be to go beyond the intention of the legislature in that statute. Gilb. Hist. of C. B. 216. — New Abr. 515. S. P. in totidem verbis. — Hard. 152. Arg. S. P.

11. Upon the Statute 1 & 2 P. & M. for chasing of distresses out of the hundred &c. whereby 5l. is given and treble damages, the plaintiff shall recover no costs, because this action and penalty is newly given. 2 Inst. 289.

12. In *assise for disseisin done with force* the plaintiff shall recover treble damages and his costs also, because at common law the plaintiff should recover damages and costs in both cases; for the Statute of 8 H. 6. cap. 9. is only an act of addition. Per Cur. 10 Rep. 116. b. Mich. 10 Jac. B. R. in Pilford's Case says, that with this agrees. 14 H. 6. 13. a. 19 H. 6. 32. a. 22 H. 6. 57. a. 12 E. 4. 1. a. F. N. B. 248. (C)

13. In *case for two slanders spoken at several times*, the defendant pleaded not guilty; the jury gave separate damages, and intire costs. *One of the slanders was not actionable*, but the other was. Judgment was not reversed in the Exchequer Chamber as to the words not actionable quoad the damages, and Cro. J. 343. pl. 9. S. C. and judgment affirmed quoad part, and reversed and

as to the residue.—
Powell J. said he had known the Case of Jacob v. Mills denied to be law many a time, and that there are 20 resolutions to the contrary, viz. if a remittitur be not entered for part, it will be bad for the whole; for the judgment is of the whole; and the Court were of all opinion, that if one of the declarations were such on which no damages ought to be recovered, it would be bad. 7. 11 Mod. 155. Hill. 1 Ann. B. R.——S. C. cited and denied per Curiam. 11 Mod. 25. in pl. 2.

14. *W. sues P. in the Spiritual Court for tithes of a dove-house. P. upon suggestion had a prohibition, but he did not prove his suggestion within the 6 months.* W. takes issue upon the suggestion, and it is found against him, and yet he prays costs by the * Statute 2 Ed. 6. [cap. 13. s. 14.] for failure of proof within the 6 months. But by the Court adjudged, that he shall not have it, for he hath surceased his time to take advantage of that, and he can never have a consultation; ergo, he shall not have double costs. Read the words of the statute. Noy 81. Whatlington v. Perry.

plaintiff in the prohibition does not prove his suggestion; but here he never can have a consultation, because the matter is passed against him; but upon failure of proof he should have prayed a consultation, and then should have double costs.

* See Tit. Prohibition (D. a. a) pl. 1. and the notes there.

15. Treble costs on a judge's certificate were given to a collector of the land-tax, in an action brought against him for distraining for 20s. assessed by the Statute of 1 W. & M. Show. 214. Pasch. 3 & 4 W. & M. Willet v. Tidney.

S. P. But had it been for other collateral matters only it might have been otherwise. Carth. 188. S. C.—12 Mod. 6. S. C. the action was for money received to the plaintiff's use; the defendant justified as collector of the land-tax; it was urged, that it is not matter concerning his office; for it may be for money received to his own use, or for overplus of distress not returned; and Holt Ch. J. inclined, that if the action was brought for overplus not returned, this does not touch his office, and he does not use the statute for defence; but because it was certified by the judge of assize that it was within the statute, the defendant had treble costs.

16. In rescous of distress for rent, per 2 W. & M. cap. 5. plaintiff shall recover treble costs as well as treble damages, for the damages are not given by the statute, but increased, an action on the case lying for a rescue at common law. 1 Salk. 205. pl. 2. Hill. 5 W. & M. Lawson v. Story.

S. C. Skin. 555. cites 10 Rep. Pinfold's Case, that damages in such case being given by the common law, and it was ruled that costs *de incremento* shall be treble also, and so upon debate it was ruled in C. B. in the Case of Sandys v. Child, affirmed here in a writ of error; and though the Case in Rolls Costs 517. be that the other is the more sure way, yet per Holt Ch. J. costs *de incremento* are also double &c. in all cases of officers &c.——Carth. 321. S. C. resolved after several debates.——Ld. Raym. Rep. 19. S. C. adjudged; for the word (treble) shall be referred as well to the word costs as to the word damages.

17. It is a rule, that in all cases where damages and costs are given at common law, and a penalty is added by a statute with double damages, that also draws double costs. Carth. 297. Hill. 5 W. & M. in B. R.

18. Debt for the penalty for acting as a commissioner of the land-tax, not having 100l. per ann. The plaintiff was nonsuited; the defendant

defendant had his costs taxed, and paid by the plaintiff, and a receipt given. Afterwards the defendant, apprehending that he was intitled to treble costs, got the Judge who tried the cause to certify that he was an acting commissioner, whereupon he had treble costs taxed, and took the plaintiff in execution for non-payment of them; to set aside which the Court was moved, and per tot. Cur. the defendant concluded himself by receiving single costs, and so the execution bad. MS. Rep. Mich. 5 Geo. B. R. Vincent v. Strode.

19. Where damages were recoverable at the time of making of the Statute of Gloucester, there the plaintiff shall recover his costs, which is by the plain meaning of the statute, which says, the plaintiff shall have costs wherever he has damages; but if there are several issues found for the plaintiff, or against the defendant, intire costs are given upon the whole pleadings, for it is the whole charge the plaintiff was at. Gilb. Hist. of C. B. 215. New Abr. 515. S. P. in totidem verbis.

(K) To Officers and Ministers of Justice. Where they are Defendants.

1. 7 Jac. 1. *IF any action upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of peace, mayor, or bailiff of a city, or town corporate, headborough, portreeve, constable, tithingman, collector of subsidy of fifteenths, for any thing by them done by reason of their offices, it shall be lawful for every such justice of peace, or other officer, and all others which in their assistance, or by their command, shall do any thing touching their offices, to plead their issue, Not Guilty; and if the verdict pass with the defendant, or the plaintiff become nonsuit, or suffer any discontinuance, the Judge, before whom the matter shall be tried, shall allow the defendant double costs.* This Statute extends to one acting under a justice of peace. Clayt. 54. Wenpeny's Case. Made perpetual 21 Jac. cap. 12.

2. The Court seemed of opinion, that a deputy-constable is within the Statute 7 Jac. cap. 5. because he comes in right of the constable, and represents his person, and Coke Ch. J. thought that an under-sheriff is within this statute, which Bridgman of counsel for the plaintiff agreed. Roll. Rep. 274, 275. pl. 49. Mich. 13 Jac. B. R. Phelps v. Wincombe. Mo 345. pl. 114. S. C. resolved, that a deputy-constable is within the equity of

the statute as to pleading the general issue. — 3 Bull. 77, 78. S. C. Doderidge J. held, that the Statute for double costs extended only to the constable, and are thereby given to him only; but Coke Ch. J. held e contra; but [at last] the whole Court agreed in opinion against the plaintiff, that the defendant, as deputy-constable, may have the benefit of the said statute to have double costs, but no judgment was given, the same being adjourned, and never moved again, but ended (as the Reporter says he heard) by agreement between the parties, perceiving which way the Court inclined in their opinions against the plaintiff. — This statute extends to one who acts under the warrant of a justice of peace, though he is no officer, who did execute the warrant; and says, this seems to be warranted by the words in the statute, viz. Any other who do any thing by command of justices of peace, and other officers therein named. Clayt. Rep. 54 pl. 93. August Affes, 13 Car. Coram Berkeley J. Wenpeny's Case.

[350] 3. Nota, Mich. 5 Car. C. B. it was said by Richardson to be the resolution of all the Justices of B. R. and C. B. that in an action upon the *case for slander, though the Court are bound by 21 Jac. cap. 16.* and cannot encrease the costs where the damages are under 40s. *yet the jury are not bound by that statute,* and therefore they may give 10l. costs where they give but 10d. damages. 1 Salk. 207. in Case of Brown v. Gibbons.

4. Action, for that the defendant falsely and maliciously spake these words of the plaintiff, viz. that the *plaintiff committed felony, and procured him to be arrested for felony, and to be imprisoned for three days,* and was found against the defendant generally, and damages to 20s. it was prayed, upon the Statute of 21 Jac. that he might have no more costs than damages, the damages being under 40s. But resolved, that this case was out of the statute, and full costs were awarded to the plaintiff. Cro. C. 307. pl. 7. Hill. 9 Car. B. R. Blizzard v. Barns.

5. Action for calling him *thief, and procuring him to be indicted and imprisoned for felony, until he was acquitted;* upon Not Guilty found for the plaintiff, and 10s. damages, it was moved upon the Statute of 21 Jac. cap. 16. that plaintiff should have but 10s. for costs. The Court conceived, that because this is not an action for words only, but also an action upon the case, in the nature of a conspiracy, and the defendant is found guilty of both, the defendant shall have judgment for his ordinary costs, and that it is out of the statute. Cro. C. 163. pl. 5. Mich. 15 Car. B. R. Topfal v. Edwards.

6. 21 Jac. cap. 16. which prohibits more costs than damages in case for words, if the jury give under 40s. damages, does not extend to Courts Baron; for if it were, this act would totally take away their power of giving costs de incremento in such cases to more than 40s. for the jury there can in no cases give damages beyond 39s. 11d. (for if they do so the Court will have no jurisdiction in the cause) and consequently the Court in no such case could give costs de incremento above 40s. which was never the intent of the act; but this act ought to be intended of courts, in which the jury may, if they please, give more than 40s. damages; but in Courts Baron they cannot; and by Wright Serjeant (who was not concerned in the cause as counsel) *costs de incremento, according as the case requires, are given in all Courts Baron in England, notwithstanding the Act of Jac. 1.* Lord Raym. Rep. 181, 182. Pasch. 9 W. 3. C. B. Littlewood v. Smith.

7 Mod. 129.
S. C. and
the Court
agreed to
the differ-
ence be-
tween an
action for

7. Case for *slandorous words spoken of his wife,* that she was a whore, *per quod he lost such and such customers;* damages under 40s. This is not within the statute; for it is not the words, but the special damage, which is the cause of action in this case, and upon evidence it is not sufficient to prove the words, but the special damage also; for the husband may bring

bring this action alone. So in an action for slander of his title, the plaintiff shall have his full costs. 1 Salk. 206. pl. 5. Hill. 1 Ann. B. R. Brown v. Gibbons.

words actionable in themselves, and by reason of consequential damage.

8. Case for scandalous words, and that the defendant procured the plaintiff to be arrested for felony, and the jury gave 1s. damages. It was said, that if a separate fact be laid in aggravation, and as a consequence of speaking the words, it might be doubtful whether full costs ought to be allowed. The Court inclined, that the plaintiff should have full costs. 8 Mod. 371, 372. Trin. 11 Geo. Phillips v. Fish.

Ibid. the Court said, that in Trinity Term, 5 Geo. PIRTON v. ANDERTON, this very point was debated

ed (viz.), whether a fact laid by way of aggravation, which was only a consequence of speaking the words, should bring it out of the statute, and entitle the plaintiff to full costs; and resolved, that where the thing laid in the declaration by way of aggravation would bear an action of itself, independent of the words &c. in such case full costs should be given; and that it is the constant difference in such cases, that where the words spoken are the very gist of the action, though other things are laid by way of aggravation, there shall be no more costs than damages, for the jury in such case can have no consideration in giving their verdict what was laid by way of aggravation; but if the action was founded on special damages, there the whole should be under their consideration. [351]

9. In an action for words brought by the plaintiff against the defendant, the plaintiff set out in his declaration, that he was a house-smith by trade, and that the defendant spoke the words of him (which words were actionable in themselves), and by reason of the speaking which words, the plaintiff had lost several customers, naming them particularly &c. to his damage of 100l. On the general issue pleaded, the jury found for the plaintiff, and gave him only 3s. damages. The Court directed the plaintiff should have no more costs than damages. 2 Lord Raym. Rep. 1588, 1589. Trin. 5 & 6 Geo. 2. B. R. Bury v. Perry.

But, per Cur. where the words are not actionable, but the action is maintained by reason of special damages the plaintiff has sustained upon account of the words, the plaintiff shall have full costs, though the damages are under 40s. for it is not the words, but the special damage is

10. In an action for words importing felony, as he stole my hens &c. and laid by the way of aggravation of damages, and that he carried him before a justice of peace, and caused him to be imprisoned &c. The jury gave under 40s. damages, and yet after several motions in court, Trin. 11 Geo. 1. B. R. the Court made a rule, that the plaintiff should have full costs. Lord Raym. Rep. 1588. Arg. cites it as the Case of Phillips and Fish, and Carter and Fish.

the cause of the action, and cited 1 Salk. 206. Brown v. Gibbons; but where the words are actionable of themselves, as in the present case, and special damages are laid by way of aggravation, and damages are under 40s. there shall be no more costs than damages, for that is properly an action for words within the Statute of 21 Jac. cap. 16. and as to the cases cited of CARTER v. FISH, and PHILLIPS v. FISH, upon considering that declaration the Court held, that as it was laid, it was not barely laid in aggravation of damages, but was a distinct cause of action, importing crimen feloniz et impofuit, and therefore the plaintiff there had full costs.—8 Mod. 371, 372. Phillips v. Fish, S. C. & S. P. the Court said, that the action in this case was founded on the words spoken, and that the procuring the plaintiff to be arrested for felony is laid in a different count, and the defendant is found guilty generally, and therefore the Court inclined that the plaintiff should have full costs.

11. 22 & 23 Car. 2. cap. 9. §. 136. (149.) Enacts, that for making the Statute of 43 Eliz. cap. 6. more effectual, that This statute likewise did not repeal

the Statute of Gloucester, for a statute cannot be repealed by implication; and therefore the judges construed it, that the costs de incremento ought still to arise in

that in all actions of trespass, assault, and battery, and other personal actions wherein the Judge at the trial shall not find and certify upon his hand upon the back of the record, that an assault and battery was sufficiently proved, or that the freehold or title of the land mentioned in the declaration was chiefly in question &c. if the jury find the damages under 40s. plaintiff shall not recover more costs than damages &c. and if any more costs shall be awarded, the judgment shall be void, and the defendant &c. may have an action against the plaintiff for such vexatious suits, and recover his damages and costs of such his suit, in any of the Courts at Westminster.

all such personal actions, where the judge's certificate was not necessary in order to the obtaining of costs, and that was not only by the statute in two cases, where trespass was done to the freehold, or to things fixed to the freehold, and the damages under 40s. and in battery, where the damages were under such sum. Gilb. Hist. of C. B. 212.

Therefore, if the defendant justified by any thing that brought the title of the land in question upon the record, there the judge shall not certify in order to intitle the plaintiff to his costs, for it was not a case within the statute. 2dly, If it was an action of trover, or trespass de bonis asportatis of goods and chattels not fixed to the freehold, it was out of the statute, and no certificate necessary to intitle the plaintiff to his costs, and therefore the plaintiff had costs de incremento on the Statute of Gloucester. So 3dly, If an action of trespass to the freehold, and an action of trespass de bonis asportatis were joined, and the plaintiff recovered in general upon both counts, he had no need of a certificate to obtain his costs; and therefore costs de incremento went upon the Statute of Gloucester. Gilb. Hist. of C. B. 212.

This construction of the judges of the Statute of King Charles, seems to be very right from the 8 & 9 W. 3. cap. 11. for the inconvenience was found, that the people did trespass upon their neighbours, yet not so as to the value of 40s. and so they could have no redress at the Courts of Westminster without losing their costs in such actions, and therefore by that statute a third manner of certificate was given. Gilb. Hist. of C. B. 213.

[352] 12. In *trespass of breaking of his net*, the defendant pleaded Not Guilty, and *evidence is for a piscary*; Winnington prayed full costs on 23 Car. 2. cap. 9. s. 149. but the issue being Not Guilty, and *no title in the declaration, nor certified by the Judge of Assize* that title was in question, the Court refused to give more costs than damages. 3 Keb. 121. Hill. 24 Car. 2. B. R. Pembroke (Earl of) v. Westall.

13. In an action upon the *case for common*, Peachell prayed restitution of costs, there being but 1d. damage, and being no certificate on the trial, that the title was in question, sed non allocatur; for per Curiam, it has been resolved, by the major part of the Justices of England, that the Statute 23 Car. 2. cap. 9. s. 149. extends only to trespasss, and assault and battery, and not to action upon the case or assumpsits, or such like; which the Court now agreed, and denied restitution, the rather here, because the title must be in question. 3 Keb. 31. pl. 59. Pasch. 24 Car. 2. B. R. Brown v. Taylor.

14. In special action upon the case for *battery of servants, per quod servitium amisit*; Barwell prayed costs without the Judges signing the postea, that the battery was well proved; and per Curiam it was granted in B. R. on 23 Car. 2. cap. 9. s. 149. 3 Keb. 184. pl. 27. Trin. 25 Car. 2. Peck v.

15. In *trespass of taking the plaintiff's bull*, on verdict for the plaintiff 25s. damages. Tremain prayed full costs, whereupon

upon it was referred to the secondary to confer with the prothonotaries of C. B. and on their report per Cur. no costs shall be allowed; and costs was denied. 3 Keb. 247. pl. 68. Mich. 25 Car. 2. B. R. Claxton v. Laws.

16. An *action brought in an inferior court for an assault and battery*, was moved into B. R. and upon the trial the jury gave 6s. 8d. damages, and 40s. costs, and the Judge before whom it was tried certified, *that the assault was sufficiently proved*. The question was, whether or no in this case the plaintiff should recover any more costs than damages? and 3 points were moved, 1st, Whether or no the Judge had sufficiently certified, because it was that the assault (and *not the assault and battery*) was sufficiently proved. 2dly, Whether or no, if the costs and damages given by the jury, exceed 40s. it shall be within the act? 3dly, Whether an action commenced in an inferior court originally, and afterwards removed hither, shall be within the act; and as to this point the Reporter says he was told, that the Judges of C. B. had adjudged, that it was, as to this, all one as if an action began here. 4thly, The Reporter says he was told, that the Judges at Serjeant's Inn had differed in their opinions, whether or no actions of the case were within the act; but the opinions of most were, that they were not, nor none but those named, viz. Trespafs and battery. Freem. Rep. 365, 366. pl. 467. Pasch. 1674, Hamond v. Rockwood.

17. An action of trespass was brought *quod domum fregit, and bona asportavit*, and as to the *domum fregit* the defendant was found Not Guilty, but to the *taking away the goods*, Guilty, and damages assessed to 15s. The question was, whether he should have any more costs than damages, in as much as being found Not Guilty as to the *domum fregit*, it is now no more than if he had brought an action of trover for the goods, and that had not been within the statute; and a precedent was cited in C. B. where it was held, that the plaintiff should have his full costs; sed *advizare vult Cur.* and so it was held here afterwards. Freem. Rep. 394. pl. 511. Trin. 1675. B. R. Anon.

18. In an *assault and battery* the case upon the evidence was this, *the defendant drew a sword, and waived it in a menacing manner against the plaintiff, but did not touch him*, so the jury were ordered to find him guilty as to the assault, but not of the battery; and the opinion of the Court was, that the plaintiff was to have no more costs than damages, for the new act excepts actions of assault and battery, so that both must be proved. Vent. 256, Pasch. 16 Car. 2. B. R. Anon.

2 Lev. 102, Smith v. Neesam, seems to be S. C. re-
[353]
solved accordingly, as the Reporter says that he

heard. — 3 Keb. 335. pl. 38. Smith v. Hadome, S. C. the Court conceived, that he can have no more costs than damages, and that the statute does not extend to the increased costs; but the court may give judgment for what damages the jury tax, though only the assault be certified,

19. North Ch. J. said, this statute was made with respect to the Statute of 43 Eliz. cap. 6. for there it is provided in personal actions, if the debt or damage is under 40s. &c. the

Judge may mark the postea, and the plaintiff shall recover no more costs than damages, but there *trespass and battery* are excepted, and then this statute provides in those cases only; the difference is upon the 43 Eliz. the party shall have his ordinary costs, unless the Judge certify [less;] but upon this last statute in trespass and battery, when less than 40s. is given, the party shall not have ordinary costs, unless the Judge do certify; and he said it was held by the Judges, that such personal actions, which did not bring the title of the land in question, were not within this statute, except battery, and therefore he held the principal case, being an action upon the case by a commoner, could not possibly bring the title of the land in question; and besides, the statute was made to prevent suits for petty trespasses. Freem. Rep. 214, pl. 222, Mich. 1676. in Case of Styleman v. Patrick.

2 Lev. 124.
Hill. 26 &
27 Car. 2.
B.R. Gravel
v. Scudamore
S. C. the Court
thought it
reasonable
that he
should have
more costs;

the cause being removed by the defendant; but not adjudged; but it being said to have been so ruled in C. B. the Court said they would advise with the justices of C. B. so that the same rule might be in both Courts.

20. *Trespass in the Palace Court*; the cause was removed into B. R. by the defendant, and the jury having given 15s. damages, the question was, upon the Statute 22 & 23 Car. 2. cap. 9. whether the plaintiff should have no more costs than damages; et per Cur. the cause being removed by the defendant, the plaintiff shall have more costs, but not if it had been removed by the plaintiff, for so he might be more vexatious; 3 Salk. 115. pl. 9.

Freem.
Rep. 214.
pl. 222.
S. C. the
jury gave
10s. da-
mages, and
40s. costs,
and North
Ch. J.
Windham,
and Scroggs
conceived,
that this
was not
within the

21. Case for eating of his grass with sheep, so that he could not in tam umplo modo enjoy his common &c. This is not within 43 Eliz. for it is not a frivolous action, because a little damage to one commoner, and so to 20, may in the whole make it a great wrong; and if it was frivolous, the Judge of Assise might mark it to be such, and though a title is here set forth to his common, yet the title of land cannot come in question, and so not be certified as in cases of trespasss, neither is there any need of a certificate, if it appears by the pleading that the title of the land is in question. 2 Mod. 141. Mich. 28 Car. 2. C. B. Styleman v. Patrick,

Statute 22 & 23 Car. 2. but Atkins J. e contra; for though the title of the land could not come in question, yet common is concerning land, and a man may have freehold in it. North Ch. J. said, that here it appears his title was in question, for he must prove his title in evidence, as it is alledged in the declaration, and they all agreed, that where it appears by the record that a title is in question, there is no need of the certificate of the Judge; but per Atkins, it may be the defendant would confess his title upon the trial, and then it would not be in question; but, according to the opinion of the other three, the plaintiff had his ordinary costs.

a Show. 28.
S. C. but not
S. P. —
S. C. cited
by Lord Ch.
B. Gilbert.
[354]
Gilb. Equ.
Rep. 193,
199.

22. In trespass for entering his close &c. the defendant justified for a way &c. the plaintiff replied that the defendant was guilty extra viam, upon which they were at issue, and the plaintiff had a verdict; the question was, whether he should have no more costs than damages; adjudged he shall have full costs, because the title to the way appears on record (viz.) of

of what extent it is, viz. so many feet in breadth &c. 2 Lev. 234. Mich. 30 Car. 2. B. R. *Affer v. Finch*.

23. In an action of *trespass*, upon Not Guilty, at the assizes in Suffolk, a *verdict* was found for the plaintiff, and 10s. damages, and 40s. costs, and judgment entered accordingly; and an action of debt was brought upon the judgment, and the defendant pleaded specially the Statute 22 & 23 Car. 2. cap. 9. against recovering more costs than damages (where the damages are under 40s.) in *trespass*, unless certified by the Judge that the title was chiefly in question, the words of the statute being, If any more costs in such action shall be awarded, the judgment shall be void. To which the plaintiff demurred, and the plea was held insufficient; because the verdict was for 40s. costs, and not costs increased by an award of the Court. If the judgment were erroneous, yet it was hard to make it avoidable by plea, notwithstanding that the words of the statute are, shall be void. 2 Vent. 36. Trin. 33 Car. 2. C. B. Page v. Kirke.

24. *Trespass vi et armis* for *slinging down* certain stalks of the plaintiff in the market place of H. It was resolved per tot. Cur. that the plaintiff should have his ordinary costs, because the statute shall be intended to reach to such action only in which the freehold may apparently come in debate, and this action is not *quare clausum fregit*, but only for destroying a chattel, and the freehold cannot come in debate, any more than if a man should take his sword out and run a coach-horse through the guts, whereby he died, and the owner shall bring *trespass vi et armis*, and recover under 40s. damages, yet he shall have his full costs. Raym. 487, 488. Hill. 34 & 35 Car. 2. B. R. Smith v. Batterton.

a Jo. 232. S. C. resolved that the statute does not extend to this case, or other like *trespass* of goods.—Skinn. 100. pl. 17. S. C. the Court ordered the party full costs; and Saunders Ch. J. said,

that a Stall is no part of the freehold.—a Show. 258 pl. 265. S. C. held accordingly. and, if the stall had been annexed to the freehold, yet if carried away it would be likewise out of the act; and in such cases, where it appears in the record, the *posse* need not be marked.—S. C. cited 3 Mod. 40.—S. C. cited by Ld. Ch. B. Gilbert. Gilb. Equ. Rep. 198.

25. *Trespass* for *breaking his close*, and *impounding of his cattle*, upon Not Guilty pleaded the plaintiff had a *verdict*, but damages under 40s. Whereupon Mr. Livesay, the secondary, refused to tax full costs, alleging it to be within the Statute of 22 & 23 Car. 2. Mr. Pollexfen moved for costs, alleging that this act doth not extend to all *trespasses*, but only to such where the freehold of the land is in question; if the action had been for a *trespass* in breaking his close, and damages given under 40s. there might not have been full costs, but here is another count for *impounding the cattle* of which the defendant is found guilty, and therefore must have his costs; the plaintiff had ordinary costs. 3 Mod. 39, 40. Hill. 35 Car. 2. B. R. Barnes v. Edgard.

Gilb. Equ. Rep. 198. S. C. cited by Ld. Ch. B. Gilbert.

26. In an action of *trespass quare clausum fregit*, and *putting stakes upon his ground*, it was held, that this was within the late statute, which enacts, that the plaintiff shall recover no

S. C. cited per Cur. Comyns's Rep. 19.

Mich. 8 W. 3. B. R. in Case of Lately v. Fry, which more costs than damages; but if *any thing had been taken away (of how little value soever)* it had not been within the statute. 2 Vent. 48. Trin. 1 W. & M. in C. B. Anon.

was trespass quære clausum fregit, & blada sua ibidem crescent. succidit & asportavit. The jury, as to the breaking of the close, and cutting of the corn in the blade, found the defendant guilty, but as to the carrying away not guilty; but where it does not appear that the trespass was committed under pretence of till, or that any thing was carried away, there we cannot make a construction contrary to the express words of the act of parliament.

[355] 27. Trespass *quare clausum fregit*, and declared of divers other trespasses. The defendant pleaded Not Guilty as to the clausum fregit, and justified as to the other trespasses, which upon the issue was found for the defendant, and as to the *clausum fregit* it was found for the plaintiff. The Court held it a clear case within the late statute, that the plaintiff should have no more costs than damages, the damages being under 40s. 2 Vent. 180. Trin. 2 W. & M. in C. B. Anon.

28. In an action of trespass, *quare clausum fregit*, and digging up and carrying away of his trees. It appears upon the evidence, that the defendant had entered into the plaintiff's close, and digged up several roots of his trees, and removed them to a place on the same ground, about two yards distance off. Pollexfen, Ch. J. and Rokeby (Powell absent) were of opinion, that the plaintiff was to have full costs, because the roots were carried from the place where they were digged, though not removed off from the ground; Ventris conceived that the taking of the roots, and laying them a little way off in the same man's ground, could not be taken as an asportavit, but by the opinion of the other two the plaintiff had his full costs. 2 Vent. 215, 216. Mich. 2 W. & M. in C. B. Anon.

if any thing was carried off from the grounds, though of never so little value, it would be an asportavit; for the words *abcarriavit*, & *asportavit*, in declarations, means such a carrying as amounts to a conversion to the defendant's use.

29. In an action of trespass *quare clausum fregit*, where as to some part there was Not Guilty pleaded, and as to the other a special justification, and a verdict upon the general issue for the plaintiff, and the special issue for the defendant. The Court took this to be within the late statute for the plaintiff to have no more costs than damages, because the issue upon the matter specially pleaded, was found for the defendant, and so the same thing if the general issue had been only pleaded, and found for the plaintiff. 2 Vent. 195. Trin. 2 W. & M. in C. B. Anon.

30. Debt for a penalty of 20l. brought by the corporation *qui tam* &c. upon a private act of parliament concerning the New River water brought to Plymouth; the action was brought against Collins for diverting the water-course contrary to the statute. Upon Nil Debet pleaded, the plaintiffs had a verdict at the assizes and the question now was, whether they should

S. C. cited per Cur. as ruled accordingly. Skinn. 368. in pl. 14. Mich. 5 W. & M. in B. R.

should have costs upon a recovery on this new and penal statute? and after deliberation it was held per tot. Cur. the plaintiffs shall have costs, because *here was a certain penalty given to certain persons*, and so within the rule for costs; but it is otherwise where the penalty is uncertain, or where it is given to common informer; and so it was adjudged upon a recovery on a private act of parliament, between the CORPORATION OF CUTLERS v. RUSLIN, that the plaintiffs should have costs, because the penalty was given to a certain person; but it is otherwise where given to an informer. Carth. 230, 231. Pasch. 4 W. & M. in B. R. Plymouth (Corporation of) v. Collings.

31. *Trespass &c. Herbam depascendo & solum & fundum carucis subvertendo & in solo fodendo & cum terra inde projecta aquae cursum suum obstupand. per quod clausum suum inundat. fuit &c.* Upon Not Guilty pleaded the plaintiff had a verdict, and 2d. damages; and the secondary refusing to tax any costs more than the damages, it was moved now, that the plaintiff might have full costs, as in other cases, and per Cur. upon view of the statute, the plaintiff shall not have full costs in this case, for that it was within the very words of the restraining clause, which allows no more costs than damages, if the damages are under 40s. quod nota. Carth. 224, 225. Pasch. 4 W. & M. in B. R. Laver v. Hobbs.

32. *Trespass for chasing his sheep, and that he (the defendant) ad loca ignota eos abduxit & elangavit;* after a verdict for the plaintiff, and 2d. damages, he had his full costs upon a motion, principally upon the word *abduxit*, which is the same in signification with *asportavit*. Carth. 225. cites Hill. 5 W. 3. Colethurst v. Hayes.

33. In an action of *trespass several trespasses* were set forth, and the defendant was found *Not Guilty as to all but one*, which was *pedibus ambulando*, and the damages 5s. and no more. This cause began originally in an inferior court, and was removed hither; and the Court allowed full costs, though the damages were so small; quod nota. 4 Mod. 378. Hill. 6 W. & M. in B. R. Roop v. Scritch.

34. *Trespass for entering his close, and cutting and carrying away his corn;* upon Not Guilty pleaded, the defendant is found guilty of all the trespasss, but carrying away the corn, and as to this he is found Not Guilty; and it was moved to have full costs, because otherwise a man might come and destroy fruit-trees and flowers in a garden, and do damage to a great value; yet upon trespass brought, the defendant could not insist upon any right, but plead Not Guilty, and the plaintiff shall have costs only according to the damage, and the act did not intend such *wilful trespasses*, but only *casual trespasses*; as the riding over a close in hunting &c. and several cases were cited, wherein such designed and voluntary trespasses, though nothing be carried away, yet full costs were given; but notwithstanding all this that was said, the

Court

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Comb. 399. Blachley v. Fry, S. C. adjournatur. — 1 Salk. 198. pl. 1. S. C. adjournatur. But Holt Ch. J. said, that where the trespass is done *clamando titulum*, or the title may come in question, there shall be full costs. —

5 Mod. 315. Court seemed strongly to incline e contra, & adviseare vult ;
 Blanchly v. but the Court agreed, that *if he had carried away, though not*
 Fry S. C. *out of the premises*, full costs should have been given, Skin.
 adjournatur. 666. pl. 4. Mich. 8 W. 3. B. R. Blichley v. Fly.

a Salk. 665. 35. Trespass for a *close broken* &c. Upon Not Guilty
 S. C. but pleaded, the Nisi Prius roll was carried to the assizes to be
 S. P. does tried, and there, by consent of the parties, the jury had the
 not appear. view, and the trial was put off to the next assizes, and then
 the issue was tried, and a verdict for the plaintiff, and 10s.
 damages; and the question was in C. B. whether the plain-
 tiff should have more costs than damages, for the Judge had
 made no certificate that the title came in question; and re-
 solved per Cur, the plaintiff should have full costs; for it *ap-*
pears upon the record, that the view was granted, but the view
 cannot be granted unless where the title comes in question,
 and therefore the granting of the view *amounts to a certificate,*
that the title came in question; and by all the prothonotaries, it
 is always the practice to give full costs where the view is
 granted. Lord Raym. Rep. 76, 77. Pasch. 8 W. 3. Kem-
 pster v. Deacon.

36. Though the *damages are under 40s. in an action removed*
out of an inferior court by habeas corpus, yet the plaintiff shall
have full costs, and it is not within 22 & 23 Car. 2. cap. 9.
 Lord Raym. Rep. 395. Mich. 19 W. 3. B. R. Canterbury
 Archbishop v. Fuller.

37. In an action of trespass *quare clausum fregit* of assault,
 battery, wounding, and of disturbance of him in his quiet posses-
 sion &c. upon Not Guilty pleaded, a *general verdict* was given
 for the plaintiff, and *damages under 40s.*, and Mr. Branthwaite
 moved to have full costs, because the defendant was found
 guilty of wounding, and disturbance of the quiet possession;
 but per Holt Ch. J. the practice has been always otherwise;
 and he said, he did not remember such a motion to have been
 made; but Gould J. said, that he moved such a motion as to
 the peaceable possession here in B. R. but it was denied him;
 and the motion here was denied, Lord Raym. Rep. 566,
 Pasch. 12 W. 3. Boiture v. Woolrick,

[357] 38. Trespass for *chasing, driving, and wounding his sheep,*
per quod some died, and others were dampnified, and also for
taking and carrying away one hog of the plaintiff; upon Not
 Guilty the jury found the defendant guilty of all but the taking
 and carrying away the hog, of which they found him not
 guilty, and gave 2d. damages; and the question was, whe-
 ther the plaintiff could have more costs than damages? and
 the Court, upon opening the matter, held the plaintiff should
 have his full costs, for this is out of the Statute 22 & 23
 Car. 2. cap. 9. 1 Salk. 208. pl. 7. Pasch. 2 Ann. B. R. Ven
 v. Phillips.

39. Though the first words are general, yet by the last
 word (*actions*) it is restrained to such wherein there be no
 certifying of the battery, or the like; therefore if it be an
 action

action wherein there can be no such certifying, as *debt, assumpsit trover, traverse for taking his goods*, trespass for *beating his servant per quod servitium amisit*, it is out of the statute. 1 Salk, 208, pl. 7, Pasch. 2 Ann. B. R. Ven v. Phillips.

40. *Trespass for breaking his close and treading down his grass*, Plaintiff had a close adjoining to the back of the defendant's house, which was a publick house; the defendant used to set up a stable for his guests in this close, and serve them there, and often used to walk there for his pleasure, and with others who shot with bows and arrows there. Holt Ch. J. said, that if the jury give under 40s. damages, though the title of the land does not come in question, he would certify, for *this a voluntary malicious trespass*, and the statute is only to be understood of small accidental trespasses, 6 Mod. 153 Pasch. 3 Ann. B. R. Dove v. Smith.

41. It was moved to have full costs in an action of *trespass*, inter alia, for *breaking his lock upon his gate*, and cited 2 Vent. 215. and 3 Mod. 39. Per Cur. had it been for *taking away the lock*, full costs might have been given. But Powell J. said, this seems to be laid as a trespass in order to try the title, and where the *freehold comes in question*, there it is held full costs shall be; but where the freehold does not come in question, there no more costs than damages; but if the Judge certifies the trespass to be *voluntary and malicious*, there the costs are to be full by Statute 22, 23 Car. 2. cap. 9. But it was adjourned to see if the Judge, who tried, would certify, 11 Mod. 198. Mich. 7 Ann. B. R. Butler v. Cozens.

It was held within the statute; for the locks were fixed to the posts, and the posts to the freehold. MS. S. C. cites Hill. 12 Ann. Lane v. Brown.

42. *Trespass for chasing his cow, and his domestick fowls, viz. hens, geese &c. with dogs, which dogs were used to bite tame fowl, by whose biting they were killed*. On Not Guilty verdict for the plaintiff, and he had his full costs, because this is not a trespass wherein the right of freehold may come in question. Gilb. Equ. Rep. 197. cited by Lord Ch. B. Gilbert as Mich. 9 Geo. 1. C. B. Keen v. Whittler.

43. *Trespass of assault, battery, wounding, and imprisonment, as also for entering and breaking his house, and opening the doors of the said house, and breaking three locks, and three bars, belonging to the said doors*. The defendant pleaded Not Guilty to all except the imprisonment, and for that he justifies; and on the trial the justification was found for the defendant, and the not guilty for the plaintiff, and the damages 2s. 6d. and held by the Court, that the damages being under 40s. he could not have full costs for the battery, because the Judge had not certified the battery to be well proved, neither could he have full costs for breaking the house &c. because this is a trespass relating to the freehold, the construction of 22 and 23 Car. 2. cap. 9. s. 149. having been, that it extends to trespass relating to the freehold and inheritance, and to such trespass only, which is collected from the exception, where the Judge certifies that the title came in question, which shews that the act extends only to

to such trespasses where the freehold might come in question, and not to trespasses of chattels; cited by Lord Ch. B. Gilbert, Gilb. Equ. Rep. 197. as Mich. 10 Geo. 1. C. B. Beck v. Nicholls.

[358] 44. Trespass was brought for *breaking and entering plaintiff's house, and keeping the plaintiff out of possession* and use of the said house, with a *continuando* for a month, whereby the plaintiff was put to great expences to gain the possession of his house, and in the mean time lost the profit and use of his house; verdict for the plaintiff, and 2s. 6d. damages, and upon motion for full costs, it was decreed by the Court; for this is a plain trespass quare claufum fregit, and the per quod is only an aggravation; and in this case the title of the freehold might have come in question, and if so, there should have been a certificate of the Judge, which not being in this case, the plaintiff can have no more costs than damages. Gilb. Equ. Rep. 197, 198. cited by Lord Ch. B. Gilbert as Mich. 12 Geo. 1. C. B. Blunt v. Miller.

45. In trespass the plaintiff declares of *breaking and entering his close*, and then counts, that B. (the defendant) *infra tempus prædict. viz. Such a day, broke and locked up the house and barn and took and detained such and such goods of the plaintiff's for four weeks in the said house and barn.* The jury found for the plaintiff, and 2d. damages. Lord Chief Baron Gilbert, who delivered the opinion of the Court, said, that though he doubted somewhat at first, yet he is now clearly of the opinion with his brothers, that there can be no more costs than damages. Here is no count, but where *the freehold might possibly come in question*; for this count is for breaking the barn, and locking up the door of the house and barn, and detaining several of the plaintiff's goods, mentioned in the declaration, in that house and barn. Now here is no substantive and independent count quoad the goods and chattels, because it is connected with the breaking and locking up of the barn, and in that case the freehold of the barn might come in question; and then locking up the goods in the barn is but mere aggravation in that count. If a man will put his goods in my barn without my leave, he cannot enter and break my barn in order to come at his own goods, and therefore upon this count the property of the goods might not be in question, but merely the barn that was thus broken. Gilb. Equ. Rep. 195. to 199. Hill, 12 Geo. in Scacc. Reeves v. Butler.

46. Another, and still a stronger, reason in my opinion, is, that it is *laid by way of detinuit*, and not by way of *asportavit*; for where it is laid by way of detinuit, he may detain a distress, & contra vadios & plegios, and not by way of asportation and conversion; and then even on the part of the count, touching the goods and chattels, the freehold might come in question, and whether such distress were lawful; so that taking this as an aggravation of breaking of the barn, as indeed it ought to be, the freehold might come in question in

in this count; or if it had been *put into an independent count, in the detinet only*, and not by way of asportation and conversion, such count would not be good in trespass, and therefore no damages could have been recovered for it, and therefore there could be no costs *de incremento*, and consequently there can be no costs in that case; this was the opinion of the whole Court delivered by the Lord Ch. B. Gilbert. *Gilb. Equ. Rep.* 199. *Hill. 12 Geo. in Scacc. Reeves v. Butler.*

47. The construction upon this statute was, that in all actions of battery, and in all actions where freehold could come in question, if the damages were under 40s. the plaintiff must procure a certificate from the Judge, in order to obtain his costs; but in all other personal actions, the law stood as it did before the Statute of Eliz. that the Judge must certify the action as frivolous, to strip the plaintiff of his costs; the plain consequence of which is, that if there be *several counts in trespass, and one relates to the freehold, in which the title may come in question, and another relates to chattels de bonis asportat. in which no title of land can come in question, and entire damages be found under 40s.* the plaintiff must have costs, by the Statute of Gloucester, because the costs are not remitted by the Statute [359] of Eliz. without a certificate from the Judge, and this is not within the Statute *Car. 2.* wherein there is a necessity there should be a certificate of the Judge, to intitle to costs; and therefore when entire damages are found, there must be some damage proportioned to that count, and if there be any damage proportioned to the count relating to the goods, that the Statute of Gloucester carries costs of course. *Gilb. Equ. Rep.* 196. *Hill. 12 Geo. in the Exchequer, in Case of Reeves v. Butler.*

48. In *trespass for a very great detriment and spoiling of the plaintiff's land*, it was moved to tax full costs, though the damages given were under 40s. but the Court said, that an asportation was out of the Statute of 22 & 23 *Car. 2. cap. 9.* sect. the last, but that a spoliation was not; and Page J. said, that the Courts had discouraged suits of this nature; for upon the Statute 43 *Eliz. cap. 6.* if the Judge certifies the suit to be vexatious, they will not allow the party his full costs, though the damages are above 40s. but he said, if the party had produced a *certificate from the Judge of the trespass being wilful and malicious*, they would have granted it; and this is required by 8 & 9 *W. 3. cap. 10.* *Barnard Rep. in B. R. 117. Hill. 2 Geo. 2. Grandey v. Wiltshire.*

49. In *trespass quare clausum fregit, and also for a trespass committed on a chattel severed*; per Cur. the authorities seem to run, that a trespass being laid to be committed on a chattel severed, the plaintiff is entitled to full costs. *Gilb. 42, 43. pl. 5. Hill. 2 Geo. 2. B. R. Granville v. Vincent.*

50. Where *de son assault demesne* is pleaded, the plaintiff is entitled to his full costs, provided he has a verdict; per Cur. clearly; but Judge Lee said, that the rule is not, that the plaintiff

plaintiff should be entitled to his full costs in all these actions of trespasss, where there is special pleading, and particularly cited the Case of PHILPOT v. JONES, Hill. 1 Geo. 1. in *trespass* there for *breaking the plaintiff's house*, the defendant *justified as bailiff under process*; the plaintiff *replied, that his doors were shut*; upon which issue was joined; verdict found for the plaintiff, and damages 2d. Motion was in that case for full costs, but the Court refused it. 2 Barnard Rep. in B. R. 277. Mich. 6 Geo. 2; Waffer v. Smith.

1 Salk. 213.
pl. 2. Mich.
8 W. 3.
Bennet v.
Talbot,
S. C. and
though the
action of
trespass
was laid for
breaking
and entering

51. 4 & 5 W. & M. cap. 23. s. 10. *If any inferior tradesman, apprentice, or other dissolute person, neglecting their trades and employments, who follow hunting &c. shall presume to hunt, hawk, fish, or fowl (unless in company with the master of such apprentice duly qualified), he shall be subject to the penalty therein, and may be sued for their wilful trespasss in coming on any person's land, and if found guilty, plaintiff shall not only recover his damages but his full costs of suit.*

his close, and treading down his grass and corn, and hunting there, the defendant being an inferior tradesman, contra pacem &c. and contra formam statuti. The Court held, that contra formam statuti should only be applied to the latter part, which was really against this statute; and that since the breaking and hunting could not be separated, the plaintiff should have his costs according to this statute; and judgment for the plaintiff. — Comb. 420. S. C. adjudged for the plaintiff; for the conclusion of contra formam statuti shall refer only to that which would reasonably bear it, and though in grammar it goes to all, yet in law it goes to the hunting only. — Carth. 388. S. C. adjudged accordingly. And per Holt Ch. J. it is sufficient to lay in the declaration, that the defendant hunted in the plaintiff's close without concluding contra formam statuti; for that should come in evidence. — 5 Mod. 307. S. C. adjudged for the plaintiff. For this was an offence before the making this act, which only repeats that clause of the Statute of 23 Car. 2. as to costs, and therefore though the declaration concludes contra formam statuti it is well enough.

[360] 52. 8 & 9 W. 3. cap. 10. s. 4. *For the preventing of wilful and malicious trespassses, be it further enacted, that in all actions of trespasss to be commenced or prosecuted, from and after the 25th day of March 1697, in any of his Majesty's Courts of Record at Westminster, wherein at the trial of the cause it shall appear, and be certified by the Judge under his hand upon the back of the record, that the trespasss upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages, but his full costs of suit, any former law to the contrary notwithstanding.*

But note,
that the
action be-
ing to be
commenced

53. 11 & 12 W. 3. cap. 9. s. 1. *Enacts, that the Statute 22 & 23 Car. 2. cap. 9. shall extend to the Principality of Wales and the Counties Palatine.*

in those Courts, if they are commenced there, and removed by habeas corpus or certiorari into the Courts of Westminster, there the plaintiff shall have full costs. Gilb. Hist. of C. B. 217.

This statute maintains the Statute of Car. 2. as extending only to the Courts of Westminster, but further enacts, that it shall be extended to the principality of Wales and counties Palatine. Gilb. Hist. of C. B. 213.

(M) How assessed or tried.

1. **WHERE** a man *tenders damages and costs, and the rest of the debt upon statute merchant, and prays scire facias to re-have his land*, the mises and costs shall be tried by averment, and not by saying of the Justices. Br. Costs, pl. 5. cites 47 E. 3. 11.

2. If in *trespass brought against two defendants one is found guilty by himself, and the other guilty by himself*, and damages severally assessed, yet the costs shall be jointly taxed. 10 Rep. 117. a. in Pilfold's Case, and says, that with this agrees 36 H. 6. 13. and 12 Ed. 4. 1.

3. Sir J. S. brought an action upon the case against P. B. upon a *trover* of goods and household stuff; the defendant pleaded as to parcel, that they were fixed to his freehold in S. in Hampshire, absque hoc that he found them in other manner; as to another part, that the plaintiff gave them to him at D. in Hampshire; and as to the other part he pleaded Not Guilty; for the first part the plaintiff caused it to be entered, *Non vult ulterius prosequi*, and took issue upon the two other, and it was *found for the plaintiff by several juries, in several counties, and damages and costs assessed by the juries*; and now the defendant brought error, and *assigned error, because both juries have assessed costs, and judgment given accordingly*, whereas the last verdict ought to do it; and where two juries are to try the issue, the form of the entry after the first verdict is, *cesset executio, until the other issue be tried*. See 21 H. 6. 51. 36 H. 6. 13. Anderson said, several issues cannot sever the costs, although they may the damages, for it is but one suit, therefore but one costs, and that is the reason that judgment shall not be given until the last issue be tried, because that *costs shall be but once assessed*, which was granted by the whole Court, and by Periam, that *the jury may assess costs for the whole suit, quod fuit concessum*. 2 Le. 177. pl. 217. Trin. 38 Eliz. C. B. Sir John Sands v. Brocas.

If there be two issues in several counties in trover, and one is tried, and judgment and execution of the costs and damages; and afterwards the other issue is tried, and costs thereupon; the last is erroneous, as to the costs. Brownl. 3. Brocas's Case.

4. Action of *false imprisonment* was brought by M. against two bailiffs of a corporation, who pleaded Not Guilty, and at the *Nisi Prius* the plaintiff was nonsuit; and now Serjeant Richardson moved upon the Statute of 7 Jac. cap. 5. for double costs, and that upon the very words of the statute, and the question was, *whether the costs ought to be taxed by this Court, or by the Justices of Assise*; Hobart said, that upon the nonsuit the Justices of Assise might have commanded the jury to have taxed the single costs, and then the same Judges might have doubled them, and that within the words of the statute; but if the Judge grants this, then upon his certificate the double costs shall be assessed, for otherwise the party shall be without any remedy, and Brownlow Ch. Prothonotary agreed with that, as to the certificate, that this Court shall assess the costs,

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costs, and Brownlow had a precedent accordingly. Win. 16: Trin. 19 Jac. Major v. Two Bailiffs.

5. After the statutes made as to costs, they began to make it a rule for the better execution of the statute, *that the jury should tax the damages apart, and the cost apart*, that so it might appear to the Court that the costs were not considered in the damages; and when it was evident that the costs taxed by the jury were too little to answer the costs of the suit, the plaintiff prayed, that the officer might tax the costs that were inserted in the judgment, and therefore said to be done ex assensu of the plaintiff, because at his prayer. Gilb. Hist. of C. B. 215.

6. Where a statute (as in waste) gives treble damages, the jury give single damages, which are afterwards trebled by the Court; for it is the jury's part as to matter of fact to ascertain the damages, and it is the business of the Court to see the law executed, and consequently to treble them. Gilb. Hist. of C. B. 216.

7. An *indebitatus assumpsit* had been brought against a collector of the land-tax; the defendant had a verdict, but because it did not appear upon the Nisi Prius Roll that this action was brought against an officer, motion was made, that this might be entered upon the roll to entitle the defendant to treble costs; accordingly the Court ordered an entry to be made in this manner; Super examinatione materiz it appears to the Court, that the action was brought against the defendant as collector; ideo consideratum est, that he shall have his treble costs; Arg: says, that such case was cited in Case of THE KING v. POLAND, and upon citing that precedent, the Court made the same rule that the like entry should be made in that case. He observed, farther, that in the Case of one WALKER AND SIR WM. EGERTON, Hill. 7 W. 3. the like entry was made upon the roll. Accordingly the Court ordered the same to be done in the present case. 2 Barnard. Rep. in B. R. 117. Hill. 5 Geo. 2. in Case of Catherol v. Cowper.

(N) At what Time Costs may be given.

1. **T**RESPASS against two for chasing in his park at D. who pleaded Not Guilty, and the one was found guilty at such a day to the damages of 30s. and the other guilty at another day to the damage of 13s. The plaintiff prayed double damages, and imprisonment for 3 years, according to the statute, and could not have it, because he took his action at common law, and not a writ making mention of the statute; and it was awarded, that the plaintiff should recover 30s. against the one, and that the plaintiff should be amerced, because he is acquitted of the trespass done with the other, and that he recover 13s. damages against the other, and that he be amerced against him, because he is acquitted of the trespass in common with the other. Br. Trespass,

pals, pl. 58. cites 47 E. 3. 10. — & concordat 9 H. 6. 2. of the Damages in Action upon Statute, and in Action at Common Law. Br. Ibid.

2. In debt of 20l. 10l. is not denied, and [as to the other] 10l. be pleaded in bar, judgment may be of the 10l. immediately, but no costs till the bar be tried of the other 10l. Br. Costs, pl. 13. cites 22 H. 6. 47, 48.

(O) Costs increased. In what Cases. [362]

1. **I**N *attaint found upon assise*, the plaintiff recovered costs, and because they were too little the Court increased them; in the written book, fol. 12. and in the printed, fol. 23. for it is false printed. Br. Costs, pl. 8. cites 8 H. 4. 23.

2. In trespass against three of breaking his park and killing his savages there &c. and the one appeared, and the others not; the plaintiff counted that he chased in, and broke his park, and killed his savages; the defendant pleaded *Not Guilty*, and the jury found that he came into the park to chase and kill savages (but did not kill any of them), to the damage of two marks, viz. 13s. 4d. for the trespass, and 13s. 4d. for the costs, and the plaintiff prayed his judgment against him who is found guilty, and released his suit against the others, by which the Court awarded, that the plaintiff recover against the defendant 40s. viz. 13s. 4d. for the damages, and 13s. 4d. for costs by the jury assessed, and 13s. 4d. more for costs increased by the Court. Br. Trespass, pl. 106. cites 5 H. 5. 1.

3. In *trespass* the defendant was found guilty at the Nisi Prius to the damage of 40s. and because the defendant had superseas and injunction that the plaintiff should not pursue at common law till the matter be discussed in Chancery, by which the plaintiff expended in the Chancery 10 marks, and after the injunction was dissolved, by which the plaintiff prayed increase of costs in Banco; and it was awarded that the plaintiff shall recover 40s. in damages, and 3l. in costs. Br. Costs, pl. 22. cites 21 E. 4. 78.

Br. Conscience, pl. 22. cites S. C.

4. Error of a judgment in Coventry was assigned, because the verdict found 5l. for damages, and 26s. 8d. for costs, and the Court awarded he should recover the damages and costs assessed by the jury, and that he should recover 53s. 4d. de incremento ad requisitionem of the plaintiff, and doth not say *pro missis suis*, and it might be that the incrementum was pro damnis. All the Court, præter Berkeley, held it well enough; for it shall be intended *pro missis*, which was the last antecedent, and that which might lawfully be increased and not pro damnis, which cannot be increased. Cro. C. 413. pl. 7. Trin. 11 Car. B. R. Anon.

(P) Payment-inforced. How. Or New Actions stopped.

1. **T**HE Lord Biron was plaintiff in an action, and upon a *non suit* 5*l.* costs were taxed against him, and he brought another action for the same matter, which was said to be merely vexation, and that he refused to pay the costs, neither could he be compelled, being a *peer*, and in *parliament time*; wherefore the Court gave day to shew cause, why this action should not stay until he had paid the costs in the former. Vent. 100. Mich. 22 Car. 2. B. R. Lord Biron's Case.

[363] 2. The Court was moved on the part of the defendant, that in regard the plaintiff had obtained the cause between them to be tried at the bar, and therefore he might be ordered by the Court to give security to pay the costs, in case the trial should be against him; but the Court would make no such rule, but said, if he will not pay the costs in case the verdict be against him, he shall take no benefit here afterwards upon it. Sty. 322. Pasch. 1652. Dudley v. Born.

3. A motion was made to stay the trial of an *ejectment* at Bar till the payment of cost of a former trial in *ejectment* in C. B. (Note, it was not between the same persons, for there was another lessor.) Dolben J. the rule of staying a trial for non-payment of costs at first was in the same Court where the former trial was, but now the rule is extended to other Courts, and forasmuch as it appears in this case to be on the same title, it is reasonable to grant the motion. Holt said, we cannot take notice that it is on the same title. Dolben, it appears by affidavit. Holt, admitting it to be the same title, yet here is another person, (viz. an heir or a devisee) who is not liable to pay the costs of the former action; and it was agreed, that where the lessor makes a new lessee in the second action, that shall not avoid the payment of costs; adjournatur. Comb. 106. Pasch. 1 W. & M. in B. R. Tredway v. Harbert.

4. An *ejectment* was brought in C. B. and a verdict for the plaintiff, but he had no costs; and now the defendant in that action brought a new *ejectment* in B. R. against the same plaintiff, and Sir Francis Winnington moved, that he might have his costs before he should be compelled to plead to the new action; but it was not granted, because he had no vexation, the verdict being for him; but if it had been against him, or that he had been nonsuited, he should not have brought another action before the costs of the first had been paid, because it was a vexation to bring a new action. 4 Mod. 379. Hill. 6 W. & M. in B. R. Roberts v. Cook.

1 Salk. 314.
pl. si. S. C.
but S. P.
does not ap-

5. The plaintiff brought *indebitatus assumpsit* for monies received after the death of the testator by the defendant, to the use of the plaintiff as executrix &c. Upon non assumpsit pleaded, the

the plaintiff was *non suit*, and now she brought a new action; and the defendant moved to have costs before the plaintiff should be permitted to proceed, but denied per Cur. But note, that in another action between these parties the plaintiff paid costs for not going on to trial according to notice. 2 Lord Raym. Rep. 865, 866. Paſch. 2 Ann. *Elwes v. Mocata*. near. — 7 Mod. 48. *Elvis v. Mocata* S. C. but not exactly S. P.

6. In *ejectment* the defendant had a verdict, and judgment, and costs taxed, and then the plaintiff brought a writ of *error in the Exchequer Chamber*, and pending that writ, he brought a new *ejectment*; and now it was moved, that he might not proceed on this *ejectment* till he had paid the costs of the first. The Court thought it hard that the defendant should be doubly vexed by the proceedings on the writ of error, and by a new *ejectment*; therefore made a rule, if the plaintiff should proceed on the *ejectment* he *shall pay the costs of the first, otherwise he shall not proceed on the second*. 8 Mod. 225, 226. Hill. 10 Geo. *Grundell v. Bodily*.

7. In an action for an *escape* brought by an *executrix* against the *marshall*, Mr. Strange moved that proceedings might be staid till she paid the costs of a *non suit* in a former action upon the same demand, and compared this case to that of a pauper; but the Court (Ch. J. absent) said, that this motion has been often made, but never allowed; accordingly it was refused in the present case. 2 Barnard. Rep. in B. R. 94 Hill. 5 Geo. 2. 1731. *Holsey v. Mullins*.

8. The plaintiff had brought a former action as *administrator*, but in the declaration had left blanks for the time when the administration was committed, and for some other particulars relating to it; the defendant demurred to the declaration for this reason, but the plaintiff instead of moving to amend his declaration, got leave of the Court, upon a *side-bar* motion, to *discontinue without payment of costs as being an administrator*. Notwithstanding this, the plaintiff had since brought another for the same cause as the former; upon which Mr. Strange moved, that proceedings in it might be staid till he had paid costs in the former, but the Court refused the motion, by reason that an *administrator is a person indemnified by the law from all costs on commencing any action*. 2 Barnard. Rep. in B. R. 154. Trin. 5 Geo. 2. 1732. *Bird v. Smith*. [364]

9. It was moved, that the trial might be put off till the plaintiff should pay the costs of a former notice. The Court agreed that they grant these motions in *ejectment*, but say they do it in no other action, upon which the motion was refused. It was then said, that it would be but a fruitless thing to pray an attachment against the plaintiff, because he absconded, so that he could not be served with it. Whereupon a rule was made, that service at his last place of abode may be a good service, and accordingly that rule was granted. 2 Barnard. Rep. in B. R. 131. Paſch. 5 Geo. 2. 1732. *Cock v. Wilkins*.

See tit.
Chancery
(A. a)

(Q) In Chancery.

Br. Costs,
pl. 22. cites
S. C.

1. *IN trespass, after issue found by Nisi Prius for the plaintiff, the defendant obtained subpoena and injunction to stay the plaintiff's suit at common law, and after the injunction was dissolved, and the plaintiff had 3l. costs by reason of the delay in Chancery.* Br. Conscience, pl. 22. cites 21 E. 4. 78.

2. He who is vexed tortiously by subpoena, shall recover damages by award of the Chancellor, and he who sues subpoena shall find surety to render damages if he does not prove his bill true. Br. Conscience, pl. 24. cites Inter statuta tit. Subpoena.

3. *Feme sole sues out of a subpoena, and the same day is married, is dismissed with costs.* Cary's Rep. 139, 140. 22 Eliz. Peer v. Cawse.

4. *Costs taxed for scandal in a bill in Chancery at 100l. but though the scandal was very great, yet by Lord Chancellor and the Judges it was reduced to 50l. and the counsel, whose hand was set to it, to pay the defendant 5l.* Chan. Rep. 194. 12 Car. 2. Emerfon v. Dallison.

3 Chan.
Rep. 65.
S. C. in
totidem
verbis.

5. *The plaintiff exhibited a bill against the father of the new defendant, and revived it against the defendant as his son and heir, which was afterwards dismissed with costs; and the question was, whether the defendant should have the costs expended by his father in the suit, before the proceedings were revived? and it was ruled he could not, for they were dead with the person.* Nelf. Chan. Rep. 147. 22 Car. 2. Lloyd v. Lord Powys.

6. *Decree of the commissioners of charitable uses for payment of costs &c. reversed.* Fin. Rep. 81. Hill. 25 Car. 2. Whar-ton v. Charles & al.

[365]
2 Chan.
Rep. 22. 20
Car. 2.
Smith v.
Holman.

7. *The plaintiff and defendant having joined in commission to examine witnesses, the defendant two days before execution of the commission, causes the plaintiff to be taken in execution for the same cause depending here; the Court ordered the defendant to pay costs and damages to be taxed, to discharge the plaintiff out of execution at his the defendant's costs, the plaintiff giving a new judgment, and also to be at the charge of a new commission, and ordered an injunction till hearing.* P. R. C. 287.

8. *Plaintiff's daughters by a second venter brought their bill against the defendant's daughters by a first venter, to prove their father's will, whereby lands were devised to be sold to raise plaintiff's portions; and on a trial at Bar, and verdict for the will, defendants ordered to join in a sale, but were allowed their costs both at law and in equity.* Chan. Prec. 93. Trin. 1699. Crew v. Jolliff.

9. *Defendant was ordered to pay to the plaintiff 100l. for putting in a scandalous answer, and the defendant who had set*
a coun-

accountfeller's hand to it was ordered to pay the plaintiff 20l. and to stand committed to the Fleet till payment. 2 Chan. Rep. 386, 387. 1 Jac. 2. Whitlock v. Marriot.

10. *Decree against an infant and his trustees that the costs should be paid out of the trust-money, but reversed, because the money was to be laid out in land wherein the infant was to be but tenant for life.* MS. Tab. May 5th, 1713. Peller als. Pollin v. Husband.

11. *Costs shall follow the event of an account; but if it be intricate or doubtful, there shall be no costs.* MS. Tab. May 8th, 1716. Pitts v. Page.

12. *A voluntary devisee brings a bill to establish the will against one who is not heir at law. Defendant by answer claimed under some ancient settlement which he could not find, and hoped when he could, he should have the benefit of it. It was insisted for the plaintiff, that the defendant might try his title by a certain time, or in default, that the plaintiff might hold and enjoy against the defendant. Bill dismissed with costs.* 2 Vern. 743. pl. 651. Hill. 1716. Chir. v. Philpott.

13. *A decree of costs necessarily follows a decree of payment of principal and interest.* MS. Tab. Dec. 1st, 1718. India Company v. Ekins.

14. *Bill to set aside leases made pursuant to a power. The bill was dismissed because a matter purely determinable at law, (viz.) Whether the power was well executed or not. Per Jekyl M. R. If a bill is brought for a matter properly determinable at law, the defendant ought to demur, and not suffer the cause to go on to a hearing, and if the bill be dismissed upon bearing, the defendant shall not have costs, because it was his fault to let it proceed; and where the title is purely matter of law, though the legal estate is vested in trustees, the cestuy que trust ought first to apply to the trustees to make use of their names in an action at law before he brings a bill in equity; for a bill in equity in such a case is only necessary where the trustees refuse their names to be made use of in an action at law to determine the right.* MS. Rep. Pasch. 4 Geo. in Chanc. Tichburn v. Leigh.

15. *Mentioned to be a rule that there shall be no costs allowed a party who could never come to his right without the aid of a court of equity.* MS. Tab. Feb. 15th, 1721. Walker v. Mackpherson.

16. *This bill being with liberty to defendants to try their title at law, in an ejectment upon the several forfeitures insisted on by their answer, there being an injunction granted in the cause upon the plaintiff, Peachy's giving judgment in ejectment was necessary to retain the bill, and continue the injunction till the right was tried at law, to prevent execution being taken out upon the judgment in ejectment given by order of the Court.*

This day the cause was set down upon the equity reserved after a trial at Bar in B. R. and verdict for the plaintiff as to

a meadow of 9 acres, that it was forfeited to the duke, lord of the manor, by making a lease thereof without licence, and as to the residue of the lands in the ejectment, the jury find for defendant; viz. that they were not forfeited.

Quære, if the plaintiff, Sir Henry Peachy, shall pay any, and what costs in this case, since the jury have found 4 parts in 5 for him in the ejectment?

It was admitted, that at law, if the plaintiff recover any part he shall have costs; but it was said, that it was otherwise in equity, where the plaintiff prevails for some things in demand, he shall have costs so far as he prevails, but as to the residue he shall pay costs pro rata; that this ejectment being tried by order of this Court, it should be subject as to costs to the rules of this Court, and now it is found by verdict that the duke did insist upon forfeiture of several parcels of land, contrary to law and conscience, and therefore ought not to have costs for what he unjustly demanded, and put the other party to an expence to defend.

Per Macclesfield C. I think in this case the defendant, the duke, ought to have his costs both in law and equity; by the rules of law, if the plaintiff in ejectment recover any part he shall have costs, and this is purely a title at law, and equity has nothing to do with it; it is true, in this case the bill was proper so far as to have a discovery of the several forfeitures insisted on by the duke, to enable him to make his defence at law, but Sir H. P. is not entitled to any relief in equity against the forfeiture, and therefore the bill should have been absolutely dismissed at the hearing, and was retained only till after the trial in ejectment to prevent the Duke of Somerset taking out execution upon the judgment given by order of the Court upon granting an injunction till the hearing. Now, since the defendant, the Duke of Somerset, has prevailed both at law and in equity, he ought to have costs in both courts, and the bill must now be absolutely dismissed, save only that the plaintiff must have an injunction to stay execution upon the judgment in ejectment given by order of the Court, with liberty to the duke to enter up his judgment upon the verdict, and to bring a new ejectment upon the other forfeitures which was found against him, if he thinks fit. Costs to be taxed by the Master, both at law and equity, MS. Rep. Trin. 8 Geo. in Canc. Peachy v. Duke and Dutcheffs of Somerset.

17. A decree nisi by default was afterwards made absolute by default also. Upon a petition of re-hearing, the Court refused to re-hear the cause, because the costs upon the first decree nisi were not paid, for the party cannot shew cause against a decree nisi by default, unless he pay the cost of the hearing nisi, and he shall not be in a better condition by suffering that decree to be made absolute by default, than if he had appeared at the day, and shewed cause against it; per Macclesfield C. MS. Rep. Mich. 9 Geo. in Canc. Hoyle v. Hoyle,

18. A bill was brought by a devisee of land to perpetuate the testimony of a will; the Master of the Rolls dismissed the bill with costs, declaring, that it being *only* for perpetuating the testimony, it ought not to have been set down for hearing. 2 Wms's. Rep. 162. Trin. 1723. Hall v. Hoddesdon.

19. Equity will not give costs *contrary to a verdict at law*. MS. Tab. February 17th, 1726. Macguire v. Maddin.

20. Costs always to be allowed *where the facts contested are presumed to be in the knowledge of the party that contests them*. [367] MS. Tab. April 4th, 1726. Cockraine v. Blantire.

21. A *sum in gross* shall never be added to a bill of costs after it is taxed by a proper officer. MS. Tab. April 28th, 1726. Parker v. Stanley.

22. Defendant *not confessing plaintiff's title*, but putting him to the expence and trouble of proving it is a circumstance to give costs. MS. Tab. Feb. 3d, 1726. Trinity House v. Rysl.

23. Plaintiff always pays costs where an account turns out against him, or *where he prevails in nothing but what he might have insisted on at law*. MS. Tab. February 29th, 1727. Lyre v. Parnel.

24. The order for making an election recites only, that the plaintiff prosecutes the defendant at law and in equity for one and the same matter, so that the defendant is doubly vexed; wherefore it provides that the plaintiff his clerk in court and attorney at law, having notice of the order, do *within 8 days after such notice, make his election* in which court he will proceed; and if he elects to proceed in this Court (the Chancery), then the proceedings at law are by that order to be stayed by injunction. But if the plaintiff shall elect to proceed at law, or in default of such election by the time aforesaid, his bill is to be dismissed with costs. 3 Wms's. Rep. 90. Mich. 1730. Anon.

25. One ought not to be condemned to pay costs in this Court for *insisting on a right which the law gives him*. Per Lord Chancellor King, 3 Wms's. Rep. 205. Mich. 1733. Brown and Ux. v. Elton.

26. A trustee *misbehaving himself* was ordered to pay costs out of his own pocket, and not out of the trust estate, 3 Wms's. Rep. 347. Mich. 1734. Lloyd & al. v. Spillet & al.

27. An heir at law is made a defendant and *insists on his title*; he shall have his costs, though it goes against him; but if an heir at law be plaintiff and *miscarries* in his suit, he shall not have costs; but on his suit appearing to be groundless, shall pay costs. 3 Wms's. Rep. 373. Trin. 1735. Luxton v. Stephens.

For more of Costs in general, See **Chancery Damages**, **Consuit**, And other proper Titles.

(A) Cottages.

This extends as well to persons politick and incorporate, as to natural persons whatsoever. 2 Inst. 736.

This branch prohibits for things;

1st. The new erecting or building of any cottage after the end of this parliament.

adly. It prohibits the conversion or ordaining of any housing or building, made or hereafter to be made, to be used as a cottage.

[368] 3dly. Albeit the house or building were made before this act, yet if the conversion were after the 29th of March 1589, it is prohibited by this statute, for in point of conversion the words be (made or hereafter to be made.)

4thly. These things are prohibited in this breach, upon pain of forfeiture of 10l. to the king for every such offence. 2 Inst. 736.

This branch includes punishment upon such as shall willingly uphold, maintain, and continue any such cottage, after the end of

2. Par. 2. And be it further enacted by the authority aforesaid, that every person that after the end of this session of parliament, shall willingly uphold, maintain, and continue any such cottage hereafter to be erected, converted, or ordained for habitation or dwelling, whereunto 4 acres of ground as aforesaid, shall not be assigned and laid to be used and occupied with the same, shall forfeit to our said sovereign lady the queen's majesty, her heirs and successors, 40s. for every month that any such cottage shall be by him or them upholden, maintained, and continued.

this parliament, either erected or converted or ordained as aforesaid for habitation &c. upon the penalty of 40s. to the king for every month, that any such cottage shall be maintained.

So as a cottage is twofold either newly erected or builded after our statute, or of a house built before or after the statute, and converted after the statute to a cottage. 2 Inst. 737.

But out of these two branches are five exceptions. By the first branch of this act any person may erect a new cottage or convert an old or a new house to a cottage, if he lay to it 4 acres of ground at the least which must have these four incidents: 1st. These acres must be accounted according to the Statute or Ordinance, De Admensuracione terrarum Anno 35 E. 1. which is after the rate of 16 feet and a half to the pole. 2dly. These 4 acres must be his or her freehold and inheritance (for neither grounds holden by * copy, or for life, or lives, or for any number of years will serve) and it must be freehold, either in fee simple or fee tail. 3dly. They must lie near the said cottage. 4thly. They must be continually occupied, therewith so long as the cottage shall be inhabited. 2 Inst. 737. — * Bull. 51, 52. Mich. 8 Jac. S. P. held accordingly in the Case of Brocks v. Bear.

This act shall not extend to any cottage, which shall be ordained (that is converted) or erected to or for habitation or dwelling in any city, town corporate, ancient borough, or market town.

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Now to any cottages or buildings erected or converted for the necessary habitation of any labourers in any mineral works, coal-mines, quarries, or delvs of stone, or slate, or about making of brick, tile, lime or coals, so as the same cottages or buildings, be not above one mile distant from the mineral or other works.

Now to any cottage to be made within 3 places viz. Within a mile of the sea. 2dly, Upon the side of such part of the navigable river where the ad. is alowght to have jurisdiction, so long as a sailor shall dwell there, or some person of manual occupation, for the making, furnishing, or victualling of any ship &c. 3dly, In any forest, chase, warren or park, so long as the under keeper or warrenier dwell therein &c.

4thly, Now to any cottage heretofore made. 1st, For a common herdsmen. 2dly, For a common shepherd &c. (of whom his cottage is called a sheepcote) to long as a common herdman or shepherd shall therein dwell. 3dly, For a poor, lame, sick, or impotent person. 3 Inst. 727.

Note, this exception extends only to cottages erected or made before this act, by reason of these words (heretofore made) but none of these 3 can be erected after this statute for any of these 3 purposes, unless there be laid to it 4 acres of ground with the 4 incidents aforesaid; Lambert justice of peace page 479. mistakes this part, and for (heretofore) says (hereafter). But by the Statute 49 Eliz. cap. 3. either the churchwardens and overseers or the greatest part of them, by the leave of the lord of the waste &c. in writing under the hand and seal of the lord, or by order of the justices of peace at their general quarter sessions, by the leave of the lord as is aforesaid, may erect convenient houses of habitation for poor impotent people, and also to place inmates, or more families than one in one cottage or house. 1st, Note that extends only to such as be poor and impotent. It extends not to any common herdman or shepherd, as hath been likewise mistaken. 3 Inst. 737.

Now doth our act extend to any cottage to be made and decreed upon complaint made to justices of assize, or justices of the peace, in open assizes or quarter sessions of the peace, to continue for habitation during the time only of such decrees. This last branch extends only to cottages made after our statute, 3 Inst. 738.

3. Par. 3. Provided also, and be it enacted, that from and after the feast of All-Saints next coming, there shall not be any inmate or more families or household than one, dwelling or inhabiting in any one cottage made or to be made or erected, upon pain that every owner or occupier of any such cottage, placing or willingly suffering any such inmate or other family than one, shall forfeit and lose to the lord of the leet, within which such cottage shall be, the sum of 10s. of lawful money of England, for every month that any such inmate or other family than one, shall dwell or inhabit in any one cottage as aforesaid. And that all and every lord and lords, of leet and leets, and their stewards within the precinct of his and their leet and leets, shall have full power and authority within their several leets, to enquire and to take presentment by the oath of jurors, of all and every offence and offences in his behalf, and upon such presentment had or made to levy by distress to the use of the lord of the leet, all such sums of money as so shall be forfeited; and moreover that it shall be lawful for the lord of every such leet where such presentment shall be made, to recover to his own use any such forfeiture, by action of debt in any of the queen's majesty's courts of record, whereunto no essoin, protection, or wager of law shall be allowed.

Here seven things are to be observed.

1st, That no inmate or under-sitter can be within this statute, but in a cottage.

[369] 2dly, This branch concerning inmates extends to cottages, as well made before this statute as after.

3dly, And as well to cottages having 4 acres of ground or more laid

to them, as is aforesaid, as others that have no ground at all.

4thly, Upon pain that every owner or occupier of any such cottage, placing or willingly suffering any such inmate or other family than one, shall forfeit and lose to the lord of the leet, within which such cottage shall be, the sum of 10s. for every month &c. This month is to be accounted according to the computation of 28 days.

5thly, And upon such presentment had or made to levy by distress &c. that is to sell the distress which he shall take within the precinct of the leet for such forfeiture, and if there be a surplussage over the value of the forfeiture, to deliver it to the owner.

6thly, This act extends as well to inmates in cottages, in any city, town corporate, ancient borough, or market town, as in any other cottage wheresoever. See Hill. 8 Jac. C. B. Rot. 113. between Pass v. Paat, in trespass, & a justification upon this statute for the penalty for keeping an inmate.

7thly,

7thly, Hereby the act gives election to the lord, to take his remedy by action of debt, in any of the King's Courts of Record. 2 Inst. 738.

In this branch these 4 things are to be observed.

1st, That these three, viz. Justices of Assize, Justices of Peace, and lords of leets, and no

other judges or justices can enquire &c. of any of the offences against this statute. And therefore the sheriff in his turn cannot enquire &c. of any offence against this statute, committed within the leet of any lord thereof.

2dly, That they may enquire hear and determine all offences &c. so as there is a concurrent power in every of these three, and the judgment &c. of such one of them as do first enquire, hear and determine the same shall stand; and each of them may enquire of all and every of the offences against this act.

3dly, As well by indictment or otherwise by presentment or information. The difference between an indictment and presentment is this, that the indictment is drawn and ingrossed in parchment in form of law, and delivered to the jurors to be enquired of &c. And a presentment is properly that which the jurors find and present to the Court, without any former indictment delivered to them, which afterwards is reduced to a formed indictment. Every indictment which is found by the jurors, is presented by them to the Court; for the record says juratores presentant &c. when they find an indictment. And therefore every indictment is a presentment, but every presentment is not an indictment.

Offences found in leets, court barons &c. are commonly called presentments, which was the reason that this act, giving jurisdiction to a leet, doth use this word (presentment) in this and the 3d branch.

4thly, By the words (to award execution by fieri facias, elegit, capias or otherwise) greater jurisdiction is given to the leet, than it had at the common law, so as the lord of the leet has by the 3d branch, power to levy the forfeiture due to him, by distress or by action of debt by the common law; and by this 4th branch, by fieri facias, elegit or capias. 2 Inst. 739.

See pl. a. and the notes there,

5. S. 5. This statute shall not extend to any cottage, in any city, or town corporate, or ancient borough, or market town, nor to any cottages for the habitation of workmen in mineral works, coal mines, quarries, or dells, or in the making of brick, tile, lime, or coals; so as the same cottages be not above one mile distant from the works, and be used only for the habitation of workmen.

[370]
See pl. a. and the notes there.

6. S. 6. This act shall not extend to any cottage within a mile of the sea, or upon the side of any navigable river, where the admiral ought to have jurisdiction, so long as no person shall therein inhabit, but a sailor, or man of manual occupation, for making, furnishing, or victualling of any vessel used to serve on the sea; nor to any cottage in any forest, chase, warren, or park, for so long as no person shall therein inhabit, but an under-keeper or warrenor; nor to any cottage heretofore made, so long as no other person shall therein inhabit, but a common herdman or shepherd, for keeping the cattle of the town, or a poor, lame, sick, or aged, or impotent person; nor to any cottage, which upon complaint to the Justices of Assize, or to the quarter sessions, shall by their order be decreed to continue for habitation, during so long a time, as by such decree shall be limited.

7. 43 Eliz. cap. 2. par. 3. Enacts that it shall and may be lawful for the churchwardens and overseers, or the greater part of them,

them, by the leave of the lord or lords of the manor, whereof any waste or common within their parish, is or shall be parcel, and upon agreement before with him or them made in writing under the hands and seals of the said lord or lords, or otherwise according to any order to be set down by the Justices of Peace of the said county at their general quarter sessions, or the greater part of them, by like leave and agreement of the said lord or lords in writing, under his or their hands and seals to erect, build, and set up in fit and convenient places of habitation in such waste or common, at the general charges of the parish, or otherwise of the hundred or county as aforesaid, to be taxed, rated, and gathered in manner before expressed, convenient houses of dwelling for the said impotent poor. And also to place inmates or more families than one in one cottage or house; one act made in the 31st year of her majesty's reign; entitled, *An act against the erecting and maintaining of cottages or any therein contained to the contrary notwithstanding*, which cottages and places for inmates shall not at any time hereafter be used or employed to or for any other habitation, but only for impotent or poor of the same parish, that shall be there placed from time to time by the churchwardens and overseers of the poor of the same parish, or the most part of them, upon the pains and forfeitures contained in the said former act, made in the said 31st year of her majesty's reign.

8. The inconveniences that grow by unlawful cottages, and inmates in cottages against this statute, as appears by the preamble *are great*, being nests to hatch idleness, the mother of pickings, thievings, stealing of wood &c. tending also to the prejudice of lawful commoners; for that new erected cottages within the memory of man, though they have 4 acres of ground or more laid to them according to the act, ought not to common in the wastes of the lord; but the greatest inconvenience of all this is, the ill-breeding and educating of youth, which inconveniences may be easily helped and remedied by the provisions of this excellent law, if lords of seats and their stewards would look to the execution of this act, which we hold the readiest means; for albeit the cottage erected or converted, cannot by any provision in this statute be demolished or pulled down, yet the execution of the penalty of this act will make it uninhabitable and work the desired effect, and they may also be amerced for wrongful commoning in the court baron, 2 Inst. 740.

9. J. S. was indicted upon the Statute 31 Eliz. *because he had erected a cottage 5 years last past, and had not allotted 4 acres of land according to the said statute De terris mensurandis 33 E. 1.* and had continued it ever since. The first exception was that this indictment was for erecting a cottage 5 years past, whereas every offence ought to be punished within 2 years by indictment or information, by the express words of the Statute of 31 Eliz. cap. 5. otherwise it is not punishable, and therefore not good. 2dly, Because he does not say that he voluntarily continued it; which are the express words of the statute. [371]
3dly,

* S. C. cited
and the
Court held
this to be a
statute. 1
Salk. 195.
pl. 1. in the
Case of the
King v. Ever-
ard Hill.
13 W. 3.

3dly, For that it is to be by the *statute De terris mensurandis* whereas there is not * any such statute, but it is an *ordnance only*; and for these causes the indictment was held to be ill; and the defendant was discharged. Cro. J. 603, 604. pl. 30. Mich. 18 Jac. B. R. Stowe's Case.

10. One was indicted for erecting of a cottage. It was moved that the indictment was insufficient, for that the words of 31 Eliz. cap. 7. are (shall willingly uphold, maintain, and continue) and the indictment is only, *that he continued, and so wants the words (willingly upheld)* according to the statute. It did not appear in the indictment *that it was newly erected*, for it is only that he continued, and not that he erected. The indictment was quashed, because being a penal law, it was not pursued. Godb. 383. pl. 470. Pasch. 3 Car. B. R. Day's Case.

11. If lord of a manor will suffer poor men to erect cottages on his waste, though he takes *no rent* for them, yet a fine shall be set upon them, and the *lord of the manor shall pay the fine*, and after the cottage built, if the *manor descends*, or is conveyed to another, if he receives any small *rent* for the continuance of that cottage, he also shall pay the fine that shall be assessed, because he *upholds*. Agreed. Jo. 272, 273. 8 Car, Christian Smith's Case. In Itin. Windsor.

12. The *statute* which gives power to erect cottages in the waste for poor people does not *extend to waste within forests*, Jo. 269. in Itinere Windsor, 8 Car. in Whitlock's Case.

13. In Windlesham in the county of Surry there were divers cottages and inclosures made upon the *king's soil*, and afterwards the *king sells the manor*; Per Noy Attorney General, this has not *dispensed with* the purpessures, but the *patentee must be fined for the continuance* of them, and they are to be pulled down if they be not now *arrented*; for else the king's grant should be taken by implication to continue a wrong to his forest, which the king never intended, and accordingly they were fined and arrented. Jo. 277. in Itin. Windsor. 8 Car, the Case of the Manor of Windlesham.

14. If the *Justice in Eyre* will grant a *licence to erect* a cottage, or make an inclosure, and *arrent* in perpetuum at a certain rent, yet if this be not done, sitting the Court, it may be pulled down again, and if such a licence and arrentation be *sedente Curia*, it is good for ever. Jo. 277. in Itin. Windsor. 8 Car. Matthew's Case.

Building
without a
licence of
the king, or
Justice in
Eyre, makes
it *purpessure*
to the forest, and
is *fineable*, and the house *demolishable*.

Jenk. 230. pl. 100. cites D. 249.

It is a good
claim for
cattle *levant*
and *couchant*, but
whether sans nombre the law is not settled, but per Cur. it would be hard to defeat it if it were
prescribed to *sans nombre*. 6 Mod. 114. Hill. 2 Ann. B. R. Anon.

15. A case in the Exchequer was cited by the Judge to be resolved, that a cottage cannot by law claim to *have common*. Clayt. 48. pl. 82. August 1636. before Barkley J. Anon.

16. It was moved to quash an indictment for erecting of a cottage contrary to the statute; the exception taken to it was, *that he erected a cottage for habitation*, but did not say it was used or inhabited as a cottage; but Bacon J. answered, that the very erection of it is an offence against the statute, and therefore the indictment did very well pursue the words of the statute, and therefore would not quash it. Sty. 33. Trin. 23 Car. B. R. Anon.

17. Though the erecting of a cottage may be presented at a Court Leet for the information of the lord, yet the Court cannot amerce the offender for it; Arg. and so was the opinion of the whole Court. Saund. 135. Hill. 19 & 20 Car. 2. in Case of the King v. Dickinson. [372]

18. A parish erected a cottage, but without any allowance by a Justice of Peace, as the Statute 31 Eliz. cap. 7. directs; upon an information in B. R. issue was taken, and found for the king. It was moved to quash the information, for that it does not lie in B. R. the statute directing, that the offence therein expressed should be punished by Justices of Assize, Justices of Peace in their sessions, and lords of leets, and no others. But Twisden J. held, that notwithstanding the words (*and no others*) the Attorney General might sue in B. R. or in other Court if he please; sed adjournatur. Sid. 359. pl. 2. Pasch. 20 Car. 2. B. R. the King v. Mosely.

a Keb. 340. pl. 10. S. C. the Court held, that the statute was only common in former by actions popular; but neither this statute, nor any other of like nature did intend to pre-

vent the king in such informations as are by the King's Attorney, or in the name of Sir Thomas Fanshaw, and the king in all penal laws may chuse his Court, and is not bound by the negative words of any penal statute.

19. Saunders excepted to a presentment in a leet for erecting a cottage, not overruling there is no land laid to it, nor contra formam statuti; and it is no offence at common law, therefore they cannot amerce by assiseurs otherwise than on the statute, which the Court agreed, and that this lies at common law, nor are four acres of copyhold sufficient within the statute; but being for encroaching so many feet, and erecting a cottage ad commune nocumentum, per Curiam, it is well as to this, not as to the cottage only, & affirmatur. 2 Keb. 606. pl. 38. Hill. 21 & 22 Car. 2. B. R. the King v. Dickinson.

Saund. 135. S. C. Saunders moved to quash it, because it is not founded on the statute 31 Eliz. cap. 7. of cottages, for it is not said that the cottage was erected for

habitation, as the statute directs, neither does it conclude contra formam statuti as it ought, if it had been founded on the statute; and moreover, the statute appoints a certain penalty of 10l. and the statute is not in this case therein pursued; then at common law the presentment is not good, because the incroachment on the lord of a manor inclosing waste and erecting a cottage therein, is no offence presentable in a leet for which the offender ought to be amerced; for it is not a public nuisance, but a particular damage to the lord; for although it may be presented at the Court leet by the information of the lord, yet the Court cannot amerce the offender for it, for the Court leet can amerce for nothing but public nuisances, and not for a particular trespass to the lord, or any other for which they may have action to recover damages. And so are the books of 48 E. 3. a. 18 H. 4. 8. b. expressly, and so it was the opinion of the whole Court, and the presentment was quashed.

20. Exception was taken to an indictment for continuing a cottage 11 months, from 5 October, 21 Car. till the taking of the inquest, viz. for the space of 11 months, which was 12 months, led

sed non allocatur on 31 Eliz. cap. 7. and 18 Eliz. cap. but *if there were fewer men ths it were void*, but they would not quash it till pleaded; but Hale Ch. J. said, it was ill and uncertain either way; Adjournatur. 3 Keb. 25. pl. 40. Pasch 25 Car. 2. B. R. the King v. Nash.

21. Indictment for erecting a cottage for habitation contra stat. was quashed, because it was *not said that any inhabited it*. For else it is no offence, per Rainsford and Moreton qui soli aderant. Mod. 295. pl. 38. Trin. 29 Car. 2. B. R. the King v. Neville.

22. Exceptions were taken to an indictment for erecting and continuing a cottage, viz. 1st. It is *said not to have four acres assigned to it the first of November, which is a month before the erection was*, for that is *laid to be the 1st of December, a month after*; for this it was quashed; other exceptions there were to it which were not moved; as 2dly, it is *said to be at a certain place infra eandem parochiam, and names no parish before*. 3dly, It does *not say the erection was contra formam statuti, but only the continuance is so concluded to be*. 4thly, It does *not say the cottage was the defendant's*, and perhaps he might be only a bricklayer or carpenter, and built it for another, and so not within this act of 31 Eliz. cap. 7. against cottages and inmates.

[373] 5thly, It does *not say it was pro habitations hominum*, perhaps it is only a cow-house, or dog-kennel, and so not within the statute; sed quære of these exceptions. 2 Show. 280. pl. 270. Hill. 34 & 35 Car. 2. B. R. the King v. Cane.

23. Exceptions were taken to an indictment for erecting and continuing a cottage, because it does *not say there were not 4 acres assigned thereto*, which if there were it is no offence within the statute against inmates and cottages, and for this exception it was quashed. 2 Show. 343. pl. 351. Pasch. 35 Car. 2. The King v. Strange.

24. The Reporter says he had another exception thereto, which is, *that it is for continuance of a cottage unlawfully erected by the space of one year, from the 10th of December 35 Car. 2. and the indictment is taken the 15th of January in that year*. 2 Show. 343. pl. 351. Pasch. 35 Car. 2. in the Case of The King v. Strange.

25. The Reporter adds a *quære*, if in those indictments for continuance of cottages, *they ought not to say they were inhabited during the time they are continued*; for it seems prima facie that such continuance is no offence, unless the cottage be inhabited, on this reason, *because by the statute the 4 acres of land are assigned to be occupied therewith so long as it shall be inhabited*, and therefore if never inhabited, there needs not 4 acres, nor can 4 acres be occupied therewith, unless it be inhabited; an house built not for habitation, but for another use, as a granary, or the like, is not a cottage within this law, but if afterwards used for habitation it becomes such, and the continuance is an offence, therefore e contra if not inhabited; for the continuance can be no offence; for by it, unless

unless inhabited, there is no damage to the publick; nor seems it within the intention of the statute, which by its provision against inmates, seems designed to prevent the increase of poor families &c. If it should be otherwise than a cottage once erected for habitation, though afterwards converted to another use, yet its continuance should be an offence, which seems an hardship; consider of this, for on first thoughts there is some semblance of reason of it. 2 Show. 343, 344. pl. 351. Pasch. 35 Car. 2. in Case of The King v. Strange.

26. An indictment was for erecting a cottage and not laying four acres of land to it, & ulterius presentant quod continuavit contra formam statuti; judgment was for the king. It was assigned for error (inter alia) that it was *not said pro habitations*, and it is no offence unless it be inhabited; for the statute was made to prevent the building of cottages for the habitation of poor people; fed non allocatur; for if it be applied to any other use than a dwelling-house the defendant must shew it, or otherwise it shall be intended to be built for his habitation. 4 Mod. 345. Mich. 6 W. & M. in B. R. The King and Queen v. Trobridge.

Comb. 307. the King and Queen v. Trobridge S. C. and the exception, that the continuavit was not said pro habitations, was over-ruled; for it suffices that it is according to

the statute.——Skinn. 564. pl. 11. The King v. Trowbridge S. C. and the said exception was over-ruled; for the continuance shall be intended to be pro habitations when the erection was so; and if it was otherwise it ought to be shewn on the other side.

27. Two Justices made an order, viz. being informed that the overseers of the poor had refused to pay 10s. a week to a poor man; they order that the said overseers shall continue to pay him the arrears till they find him a house. It was objected against this order, that the overseers have not power to find a house for him, that must be done by the consent of the lord of the manor, or by the Justices in sessions; it did not appear that he was poor or impotent, and for these reasons it was quashed. 5 Mod. 397. Pasch. 10 W. 3. Anon.

28. An order of sessions for suppressing a cottage upon 31 Eliz. cap. 7. was quashed; because cottages are not to be suppressed by indictment. 12 Mod. 406. Trin. 12 W. 3. The King v. Harris. [374]

29. A cottage implies a court and backside; for a cottage without four acres of land is against the statute. 31 Eliz. cap. 7. per Cur. 6 Mod. 114. Hill. 2 Ann. B. R. Anon.

30. An information was moved for against a man for building an house upon a common, and enclosing part thereof, and denied per Cur. and said, that they would not call a person into this Court for a thing of that nature, but the parties grieved might take their proper remedy. The like motion had been denied formerly for the same reason. MS. Rep. Mich. 5 Geo. B. R. Anon.

31. Thirty years possession of a cottage erected by the possessor, without licence or order, is a good title against the lord of the manor by virtue of the Statute of limitations, if he should bring

bring an *ejectment* to recover the possession. 8 Mod. 287. Trin. 10 Geo. The King v. Wilby Parish.

32. A. built a cottage without licence on the waste of a manor, and died, and his *heir is in possession by descent*, this is a good title against any escheat the lord might have at common law. 8 Mod. 287, 288. Trin. 10 Geo. in the Case of the King v. Parishioners of Wilby.

For more of Cottages in general, See *Copyhold. Easance.*
And other Proper Titles.

Covenant.

(A) How ; [In what Cases, and On what Deeds.]

[1. **A**N action of covenant lies upon a deed indented without doubt.]

Though
covenant

[2. [So] An action of covenant lies upon a deed-poll.]

may be brought upon a deed-poll, yet the party must be named in the deed ; per Cur. 1 Salk. 197. pl. 3. Pasch. 6 W. & M. in B. R. in Case of Green v. Horne. — Plaintiff may take benefit, though not mentioned as a party; and if I oblige myself to pay J. S. 100l. the obligation is made to him for what benefit it is. Comb. 219. in S. C.

Cro. J. 505.
pl. 17. Ben-
nus v.
Guyldley.
S. C. ad-
judged per
tot. Cur.
for the de-
fendant.
See tit. ac-
tions (P) pl.
21 S. C.

[3. As if A. recovers a debt against B. and B. pays the money to A. upon which A. releases all actions and executions &c. to B. and by the same deed promises him to discharge the said judgment, and not to sue execution thereupon, and after sues execution against him, he may have a writ of covenant upon this deed, and not an action upon the case. Mich. 16 Jac. B. R. between Bemishe and Hildersty adjudged.]

4. In London a man shall have a writ of covenant without a deed for the covenant broken. F. N. B. 146 (A) cited 27 H. 6. 10.

[375]
Vaugh. 119.
Arg. cites
S. C. —
F. N. B. in
the new
notes there
(b) cites 17

5. If a man makes a lease by deed-poll and the lessor puts out the lessee, he shall have a writ of covenant upon the deed poll ; but if a stranger who has no right puts out the lessee, he shall not have a writ of covenant against the lessor, because he hath remedy by action against the stranger ; but if the stranger enter by eigne title upon the lessee, then he shall have an action against the lessor,

lessor, because he hath no other remedy. F. N. B. 145. (K).

E. 3. Covenant. s. accordingly.

6. Covenant lies only where the thing covenanted to be done is to be done in futuro by the person of any, and differs from the case where it refers to a thing which is not to be done by the person of any, but to a thing to be executed in itself. Arg. Pl. C. 1, 8. a. 6 E. 6.

Vent. 26. Arg. cites S. C. that where a covenant terminates in itself it is not properly

a covenant, but a desistance; and Windham said (to which the other justices agreed), that a covenant to do a present act is not properly a covenant; as to stand seized.

7. If a man leases lands for life by deed, and afterwards puts lessee out, the lessee shall not have a writ of covenant against him, but an assize. F. N. B. 145. (M).

Ibid. in the new notes there (c) says see 20 E. 3. judg-

ment 177, accordant, for that the demise is good from his entry.

8. The queen by letters patent licensed A. to buy and transport hither wool. A. by indenture grants the licence to B. for 8 years, and in consideration thereof B. covenants to pay him 100l. yearly at Lady Day and Michaelmas, and that every year at Lady Day, or within 20 days after, he will make a new bond for payment of the money; provided that if B. does not yearly make the bond, or fails in payment of the money, that then, from thenceforth the indenture, and every clause &c. therein contained, shall be void, and B. fails of making the obligation at the first day, yet A. may have an action upon the covenant, for it was said the intent of the parties was only that it should be void as to have any benefits or covenants broken in futuro, but as to covenants broken before, it was never their intent but that the party should have advantage of them. Cro. E. 77, 78. pl. 37. Mich. 29 & 30 Eliz. Nuns v. Gee.

In debt upon an obligation with condition to perform covenants in an indenture of lease, the defendant pleads, that after, and before the original purchased, the indenture was by the assent of the plaintiff, and the defendant cancelled and

avoided, and so demands judgment if action, and seems by Coke clearly, that the plea is not good without averment that no covenant was broken before the cancelling of the indenture. s Brownl. 167. Paich. 10 Jac. C. B. Anon.

9. M. made a lease of a parsonage of D. for seven years, and did covenant to save the lessee harmless against B. the parson &c. in that case it was held, if the parson sue the covenant by right or wrong, an action lies upon the covenant. Brownl. 21. Trin. 9 Jac. cites it as Maper's Case.

10. Lease by the Dean and Chapter of Norwich, dated 38 Eliz. to T. for 99 years; afterwards they made another lease 42 Eliz. to W. for three lives, and covenanted to save him harmless against T. the first lessee; it was agreed that the covenant is good, and yet in force; for when an estate is created in which is implied a covenant in law, there if the estate be void the covenant is void also; but when there is an express covenant in deed, there it is otherwise, although the lease be void or voidable; as if he covenants that the lessee shall enjoy during the term, and the lessee resigns, yet is the covenant good,

Mo. 873. pl. 1223. Walter v. the Dean and Chapter of Norwich. S. C. and the Justices agreed, that because the dean who made the lease was

living at the time of the eviction, the lease although the term is gone. *Ow. 136. Pasch. 10 Jac. Waller v. the Dean and Chapter of Norwich.*

was not void; and therefore it was adjudged for the plaintiff.——*Brownl. 21. S. C. and [376] Coke said, that if the lease was originally void, yet covenant would lie; for otherwise great mischief might happen; for a dean might make a lease to A. to-day and keep it secret, and to-morrow make a lease to B. and covenant for enjoyment, and so avoid the second lease.——2 Brownl. 134. S. C. argued.——Ibid. 158. Waters v. the Dean and Chapter of Norwich. S. C. argued by the counsel, and afterwards by the Court, and judgment for the plaintiff.*

11. A man may covenant *with two severally*, because it differs from the case of a bond, for covenant sounds only in damages; but the covenantees ought *not to join in actions*; per *Crawley and Reeve J. Mar. 103. pl. 176. Trin. 17 Car. C. B.*

12. If I make a *lease for years, reserving rent to a stranger*, an action of covenant will lie for the party to pay the rent to the stranger; per *Hale Ch. J. Mod. 113. pl. 12. Pasch. 26 Car. 2. B. R. in Case of Deering v. Farrington.*

13. If a man *assigns a bond to J. S. and afterwards receives the money of the obligor*, if he do not *immediately pay it over to the assignee*, the assignee may maintain an action of covenant against him upon the word *assignavit*, and that was the case of *Deering v.* Per *Holt Ch. J. 2 Lord Raym. Rep. 1242. Hill. 4 Ann. in Case of Seignorett v. Noguire.*

14. So if the *obligee covenants to assign a bond to J. S. such a day*, and will not assign it, or before the day receives the money of the obligor, by which means he has disabled himself to assign it, in either of these cases it is a breach of covenant, and yet in strictness a bond is not assignable. Per *Holt Ch. J. 2 Lord Raym. Rep. 1242. Hill. 4 Ann. in case of Seignorett v. Noguire.*

(B) Upon what Deed [*the Plaintiff might have Debt or Covenant.*]

Cro. J. 399. pl. 6. and 521. pl. 7. S. C. adjudged.——Roll. Rep. 359. pl. 11. S. C. and 2 Roll. Rep. 63. S. C. adjudged.——3 Bullt. 163. S. C.——Godb. 276. pl. 391. S. C. adjournatur.——Poph. 136. 137. S. C. & S. P. agreed that it is a covenant, especially it being in the Case of the Queen.——Cro. J. 240. pl. 5. Pasch. 8 Jac. B. R. Ewre v. Strickland, S. P. resolved; for when he takes by the patent he consents to all things therein.——Bullt. 21. S. C. but not S. P.

[1. A Writ of covenant lies upon the *king's patent*, though there is *no counter-part sealed* by the lessee who is to be charged. My Reports, 14 Jac. B. Sir *J. Brett and Cumberland* for his own acceptance. *Hill. 16 Ja. B. R. in a new Action between the same Parties adjudged again.*]

{ Fol. 518. [2. If *A. grants a rent to B. payable at a certain feast yearly, and covenants to pay the rent at the feast*, an action of covenant lies for non-payment, though he might have had an action of debt

debt for it. M. 7. Ja. B. between *Stronge and Wats*, per Curiam adjudged.]

[3. If one man covenants with another to pay him 20l. at a day, though he may have an action of debt for the 20l. yet he may have a writ of covenant at his election. H. 7. Ja. B. per Curiam.]

4. A man shall have a writ of covenant against the sureties, who became sureties, or gave security that a man should perform such covenant &c. F. N. B. 146. (B.) cites 39 E. 3. 9.

5. If I grant to my tenant for life, that he shall not be impeachable for waste, he shall not plead this in bar, but shall have an action of covenant thereupon. Bridgm. 117. cites 21 H. 7. 30. per Fineux, in *John de Puseto's Case*.

6. If I grant to one against whom I have cause of action, that I will not sue him within a year, this is not any suspension of the action. Bridgm. 117. cites 21 H. 7. 30. per Brudenell, and says, that upon this case it is to be observed, that I may sue, and that the other is put to his action of covenant.

7. A covenant in law will go to lawful eviction, though the lease be void; but as to a covenant real to warrant and defend, there must be a title paramount, and a lawful eviction; and covenants in leases shall be taken beneficially for the lessees; per Coke Ch. J. Brownl. 21. Trin. 9 Jac. in *Case of Walter v. Dean &c. of Norwich*.

8. Action of covenant will lie on a void lease, and Sir E. Coke said, that so it should do though the lease was originally void. Brownl. 21. Trin. 9 Jac. *Walter v. the Dean and Chapter of Norwich*.

S. F. held by Coke Ch. J. accordingly.

9. It lies upon a warranty in a fine sur concessit by feme covert, and that without deed, as seemed admitted by all. Sid. 466. pl. 1. Mich. 22 Car. 2. B. R. *Wootton v. Hale*.

& S. P. agreed by the counsel on both sides and the Court. — Saund. 177. S. C. held accordingly.

10. A covenant will lie on a bond; for it proves an agreement per Lord Chancellor, Chan. Cases, 294. Mich. 28 Car. 2. *Hill v. Carr*.

if it be assigned, it is a covenant that the assignee shall receive the money to his own use; per Holt Ch. J. obiter Lord Raym 683. Trin. 13 W. 3.

(C) What Words will make an express Covenant.

[1. THESE words in a deed of lease, [viz.] and the lessee shall repair the mills (being the thing leased) as often as need shall require, and shall leave them sufficiently repaired at the end of the term, make a covenant, because it is a clear agreement

adjudged that the words, which were in the Queen's pa-

ment, amount to a covenant on the part of the lessee, and by his acceptance of the lease, he is bound by the covenant.——Ibid. 521. pl. 7. S. C. & S. P. resolved accordingly.——Foph. 136, 137. S. C. agreed that it is a covenant; for being by indenture it is the words of both parties, and it is more strong being in the Case of the Queen.——Godb. 276. pl. 391. S. C. & S. P. adjudged; but as to another point adjournatur.——Roll. Rep. 359. pl. 11. S. C. & S. P. Arguod fuit concessum per Coke Ch. J. For he said that it is a clear agreement. And the reporter says, that this was afterwards adjudged, but that it was admitted by the Court and counsel of the other side, but there was no other speaking of it.——2 Roll. Rep. 63. S. C. and resolved that it was an express covenant, and judgment accordingly.

Brownl. 23. S. C. & S. P. admitted.

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——Hob. 12. pl. 24. S. C. but S. P. does not appear.

——Sid. 423. pl. 1. cites S. C. adjudged.

[2. If lessee for years covenants to repair &c. provided always, and it is agreed, that the lessor shall find great timber &c. This makes a covenant of the part of the lessor to find great timber, by the word (agreed), and it shall not be a qualification of the covenant of the lessee. Tr. 12 Ja. B. between *Holder and Taylor*, per Curiam.]

[3. But if the lessee covenants to repair, provided always, that the lessor shall find great timber, without the word (agreed) that this proviso shall not make any covenant on the part of the lessor, but it shall be only a qualification of the covenant of the lessee. Tr. 12 Ja. B. between *Holder and Taylor*, per Curiam.]

Cro. 128. pl. 9. Geery v. Reason. S. C. adjudged without argument for the defendant.

[4. If there are articles of agreement made by indenture between A. and B. in which A. agrees that B. shall have a house in a street in London for certain years, provided, and upon condition, that B. shall receive and pay the rents of the other houses of A. in the same street mentioned in a schedule annexed to the indenture; and it is further agreed, that B. for his labour in the collection of the said rents, shall have the overplus of the rents over and above such a certain sum. This is not any covenant on the part of B. to bind him to receive and pay the rents mentioned in the schedule, but the proviso and condition only will make the estate of B. void in the house (this being a lease), and will not make a covenant. Mich. 4 Car. B. R. between *Geary and Read*, adjudged upon a Demurrer upon a Declaration, which intratur, P. 4 Car. Rot. 432.]

Br. Covenant pl. 4. cites S. C. —— Fitz. Covenant pl. 16. cites S. C.

[5. If A. leases to B. for years, upon condition, that he shall acquit the lessor of ordinary and extraordinary charges, and shall keep and leave the houses at the end of the term in as good plight as he found them. If he does not leave them well repaired at the end of the term, an action of covenant lies. 40 E. 3. 5. b.]

* And. 19. pl. 38. Gravenor v. Parker S. C. and the Court held accordingly.——Bendl. 72.

[6. If A. leases to B. for life, with a proviso, that if the lessee dies within the term of 40 years, that then the executors of the lessee shall have it for so many of the years as amount to the number of 40 years, to be accounted for the date of the indenture of lease. This proviso shall not be a lease, but only a covenant.

* D. 3. 4 Ma. 150. S. 83 + Co. 1 Reft. Ched. 155.]

pl. 115. S. C. held accordingly.——S. C. cited Mo. 247. in pl. 388.——S. C. cited Mo. 480.

480, and says the reasons of the justices seemed to be, 1st, because the words of the proviso do not purport a grant but an agreement, and consequently sounds in covenant and not in demise. adly, If it should be a demise, then there was not any person to take it; for it is appoined to the executors and assigns of lessee, whereas there are no such in rerum natura, nor parties to the deed.—Hob. 35. in pl. 39. cites S. C.

+ Mo. 478. pl. 684. Mich. 37 & 38 Eliz. B. R. Lloyd v. Wilkinfon S. C.

What words will make a lease for years. See tit. Estate (T. a) (U. a) (X. a) &c.

[7. If there are articles of agreement between A. and B. by which it is agreed, upon a marriage intended between A. and C. that all the stock of C. shall remain in the hands of B. till A. shall make a certain jointure to C. ipso B. annuatim solvendo to A. interesse proinde, secundum ratam 8l. per centum (*) &c. If B. does not pay the said interest, an action of covenant lies against him upon these words, because every agreement by deed is a covenant, and otherwise A. shall not have any remedy for the money. M. 8 Car. B. R. between *Crofs and Northey*, adjudged upon Demurrer. Intratur, P. 8 Rot. I myself being de Concilio Querentis.]

Fol. 519.

[8. If A. makes a deed to B. in these words: *I have in my custody one writing obligatory, in which writing obligatory one William now standeth bound to the said B. for the payment of 400l. upon such a day, being the proper money of B. and I will be ready at all times, when I shall be required, to re-deliver the same writing obligatory to the said B.* If B. after demands the said obligation of A. and he refuses to deliver it, B. may have an action of covenant upon this deed by force of the words (*and I will be ready at all times, when I shall be required, to deliver the same.*) Pasch. 11 Car. B. R. between *Walker and Walker*, adjudged upon a Demurrer per Curiam, this matter being opened and perceived by the Court, but the council of the other part did not question it. Intratur, Hill. 11 Caroli. Rot. 311.]

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[9. If a man conveys land to another in fee with warranty, and after the land is evicted by elder title for certain years; the grantee of the land may have an action of covenant upon the said words against the grantor upon the eviction, though the warranty be annexed to the freehold; for the said words make a covenant if a chattel be evicted, and a warranty if a freehold be demanded. My Reports, Pasch. 12 Ja, in *Camera Scaccarii*, between *Rudge and Pincombe*, adjudged in a writ of Error. Vide same Case, P. 12 Jac. B. Hobart's Reports 5.]

Roll. Rep. 25. pl. 3. S. C. and judgment in B. R. affirmed. —Yelv. 139. Pincombe v. Rudge S. C. adjudged. —Noy. 131. Pinckard v. Ridge

S. C. held accordingly. —Hob. 3. pl. 6. S. C. held accordingly in *Cam. Scacc.* by all the judges. —Jenk. 191. pl. 31. S. C. — S. C. cited by Hobart Ch. J. Hob. 28. —Jenk. 224. pl. 83. cites S. C.

[10. If a man leases for years, reserving a rent, an action of covenant lies for non-payment of the rent; for the reddendo of the rent is an agreement for payment of the rent, which will make a covenant.]

S. P. per Cur. and said it had been so resolved many times be-

fore. But dubitatur if the word (reddendo) will maintain an action of covenant upon a lease for life. 2 Jo. 102. Pasch. 30 Car. 2. B. R. *Harper v. Bird*. —2 Lev. 206. *Harper v. Burgh*, S. C.

held that the *reddendo* is a covenant in law. — S. C. cited 8 Lev. 158. — *Reservation* of rent by the several words (yielding and paying) in a lease for years seems to be an express covenant. For it is the agreement of both parties, viz. of the lessor and lessee; per Roll Ch. J. and judgment, Nisi. Sty. 287. Mich. 1653. *Newton v. Osborn*. — S. P. by Roll Ch. J. to which the Court agreed, and so a judgment was affirmed. Sty. 407. Hill. 1654. *Porter v. Swetnam*, Vent. 10. Hill. 20 & 21 Car. 2. B. R. at the end of the Case of *Nurslie v. Hall* is a note, that was said in that case that the word *reddendum* makes a covenant. — Covenant will lie upon the words yielding and paying. Arg. 2. Mod. 174. — Lease for years rendering rent free of all taxes &c. The word *rendering* &c. makes a covenant. Carth. 25. Pasch. 2 W. & M. in B. R. *Giles v. Hooper*.

11. In debt the lessor leased by indenture for 20 years, rendering 10 l. per annum at Easter, and other covenants in the indenture ex utraque parte &c. and to the performance of all the covenants &c. each by the same indenture bound himself to the other in 20 l. and for non-payment of the 10 l. at Easter he brought action of the 20 l. and per *Newton* clearly it does not lie; for reservation of the rent and non-payment of it is no covenant, and action of covenant does not lie of it, therefore this is no breach of covenant, ad quod nemo respondit. Br. Covenant, pl. 21 cites 22 H. 6. 58.

12. Absq. impetitione, denegatione, restrictione, in an indenture amount to covenant. Le. 277. pl. 375. Hill. 26 Eliz. B. R. *Bishop v. Redman*.

13. The words of an obligation were, *I am content to give to A. 10 l. at Michaelmas* and 10 l. at our Lady Day; either debt or covenant lies upon it; per Cur. 3 Le. 119. pl. 199. Mich. 27 Eliz. B. R. Anon.

[380] 14. *Gawdy* and *Fenner J.* were of opinion, that upon a lease for years by indenture by *dimisit & ad firmam tradidit*, that a covenant lies against the lessor if he enters; but if a stranger enters, it lies not without an express warranty; for in a covenant against the lessor upon these words he shall recover the term itself. Cro. E. 214. pl. 6. Hill. 33 Eliz. B. R. *Andrews's Case*.

See condition (T) pl. 15. and the notes there. 15. A. putting the house in repair, B. covenants to keep it in repair; they are mutual covenants. Raym. 183. per *Twisden J.* cites it as resolved Cro. Jac. 645. *Salter [Slater] v. Stone*, and Sty. 140. *Bragg v. Nightingale*.

S. C. cited 6 Mod. 35. by Holt Ch. J. by the name of *Lutton* and *Craidon* in the later end of *Styles*, that where a thing is awarded to be done upon payment and receipt, that tender of payment 16. L. articulated by indenture with C. to pay C. 110 l. at a certain day, C. covenanted that upon payment thereof to him he would give an acquittance, and enter into a bond of 400 l. to L. to save him harmless from all claims to such lands in L's. possession. L. tendered the money at the day to C, who refused to receive it, and give an acquittance, and to enter into the bond. L. brought covenant, and assigned the breach that he tendered the money, and that C. refused to accept it &c. Per Glyn Ch. J. Here is no breach assigned to ground an action upon; for the articles are, that upon the receipt of the money the defendant should give the acquittance &c. and enter into the bond; and it may be that it was the intent of the parties that it should be in C's. election to receive 110 l. or not, and the plaintiff is not prejudiced by the defendant's not

not receiving it; and judgment *Nisi* &c: Sty. 481. Trin. 1655. London v. Craven. and refusal intitles the party to it as much as

an actual payment, and said the authorities have been so ever since.

17. Covenant was brought upon these words, viz. *I oblige myself to pay so much at such a day, and so much at another day*; per Cur. clearly this action lies, especially if both the days of payment are not past; but Hale Ch. B. doubted how the law would be if the words were *teneri & firmiter obligari*; because those words found in debt, and not in covenant. Hardr. 178. Hill. 12 & 13 Car. 2. in the Exchequer. Norris's Case.

18. In debt the plaintiff declared on *articles* indented, by which C. upon the marriage of M. was to receive the marriage portion of M's. wife, being 1500l. and that C. should convey an office to M. provided that M. out of the first profits of the office, should pay to C. 500l. and averred that he had conveyed the office, and that M. had received 500l. of the profits, but had not paid it to the plaintiff, and upon demurrer to the declaration adjudged that the action lies upon this proviso; for it is not a condition or defeasance, but an agreement to pay the 500l. Lev. 155. Hill. 16 & 17 Car. 2. B. R. Clapham v. Moyle.

Keb. 842. pl. 31. S. C. 860. pl. 71. S. C. 195. pl. 66. S. C. Twiſden agreed the proviso but a covenant, but conceived that it referred to a future conveyance, and that it should be

averred that he had made a conveyance of the office, and that saying licet he had performed all covenants on his part is not sufficient; but by the other opinion judgment was given for the plaintiff.

19. The Court inclined, that the words *grant and infeof*, in case of a freehold, doth not amount to a covenant, or warranty; adjournatur. 3 Keb. 188. pl. 33. Trin. 25 Car. 2. B. R. Anon.

3 Keb. 617. pl. 84. Hill. 27 & 28 Car. 2. B. R. Brown v. Haywood

seems to be S. C. the Court held the word (grant) no warranty of a freehold, but only in case of a lease for years, and judgment accordingly.—Freem. Rep. 414. pl. 547. Browning v. Honeywood S. C. that they do not amount to a covenant, but *dedi* will make a warranty; and says, that if a *chattel be enfeoffed* will make a covenant, come semble, and cites Hgh. 4. [pl. 6. in case of Pincomb v. Ridge.]

* Noy 131. in case of Pinkard v. Ridge S. P. — See pl. 9.

20. If a man assigns and transfers a thing which is not assignable or transferrable; as if he assigns &c. all the money that shall be allowed him by a foreign state in lieu of his share in a ship, this is a covenant, and it is all one as if he had covenanted, that he should have all the money which he should recover for loss of his ship; per Hale Ch. J. But Twiſden seemed to doubt; but judgment, Mod. 113. pl. 12. Pasch. 26 Car. 2. B. R. Deering v. Farrington.

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3 Keb. 304. pl. 45. S. C. and per Hale, though the words assign, transfer, and set over, do not amount to a covenant against an

cigne title, yet against the covenantor himself it will amount to a covenant. — Freem. Rep. 368. pl. 473. S. C. and by Hale Ch. J. though it does not amount to an implicit covenant against cigne title, yet they may be good against the party himself and his assigns.—S. C. cited by Holt Ch. J. Lord Raym. Rep. 683. and says, that though a bond is not assignable in point of interest, yet the assigning thereof is a covenant that the assignee shall receive the money to his own use.—S. P.

y Holt Ch. J. and S. C. cited. 2 Lord Raym. Rep. 1248. Hill. 4 Ann. in Case of Seigniores v Noguire.—S. C. cited. Arg. 2 Lord Raym. 1419. Trin. 12 Geo. in Case of Frontin v. Small.

Covenant will lie upon any words in a deed purporting an agreement for payment of money. Lev. 47. Mich. 13 Car. 2. B. R. Brice v. Carre, Emerfon & al.

21. *Where ever the intent of the parties can be collected out of a deed for the doing or not doing a thing, a covenant lies.* 1 Chan. Cases. 294. Mich. 28 Car. 2. Hill v. Carr.

22. *Any thing under the hand and seal of the parties which imports an agreement will amount to a covenant; per Lord Chancellor.* 2 Mod. 91. Pasch. 28 Car. 2. in Canc. Hollis v. Carr.

23. Debt upon bond with condition, that the obligor did acknowledge to be indebted to the obligee in 40*l.* which he did thereby covenant to pay when such a bill of costs should be stated by two attornies indifferently, to be chosen by them; plaintiff declares, that he named an attorney, and desired the defendant to name another, which he refused. It was objected, that this shall not be taken for a covenant, but an agreement, solvendum the money when the bill of costs should be stated, and by the plaintiff's own shewing, the bill was not stated, therefore nothing is due; sed per Cur. this is not a solvendum but a covenant, which does not take away the duty ascertained by the obligation, and if it should not be a covenant, then it would be in the power of the obligor, whether ever it should be payable. 2 Mod. 266. Mich. 29 Car. 2. C. B. Otway v. Holdip.

24. Where a party to a deed agrees to pay, it amounts to a covenant, though the words covenant, grant &c. are wanting. 2 Mod. 268, 269. Mich. 29 Car. 2. C. B. Harwood v. Hilliard.

25. 6 Annæ, cap. 25. *All covenants, conditions, and agreements, in every grant, lease, or copy of Court-roll so made, shall be good in law, according to the contents of the same against the reverfioner, and against them to whom the interest thereof shall come.*

(D) In what Cases the *Heir* or *Executor* shall be bound by the exprefs Covenant of the Testator, without naming them.

Br. Covenant, pl. 12. cites 48 E. 3. 1. S. C. & S. P. by Finch. but Persey e contra.—Fitz. Covenant, pl. 21. cites 48 E. 3. 22. [but seems misprinted, and that it should be 1. b. 2. a. pl. 4.] S. P. held by Finch. according to Roll; but

[382] Wy. regavit omnino.—Shelley and Fitzherbert held, that covenant lies in such case against the executor, and said, that so is 47 E. 3. 23. But Baldwin said privately, that there is a difference between an obligation wherein there is no mention of executor, inasmuch as it

1. *In every case where the testator is bound by a covenant, the executor shall be bound by it, if it be not determined by his death.* 48 E. 3. 2.

it is a duty, but covenant is executory, and founds only in damage and tort, which (as it seems) dies with the person &c. D. 14. a. pl. 69. Trin. 28 H. 8. Anon. — Cro. E. 552, 613. pl. 3. Arg. cites S. C. and per Popham, Clench, and Fenner, (absente Gawdy) a covenant lies against an executor in every case, though he be not named; unless it is such a covenant as is to be performed by the person of the testator, which the executor cannot perform.

2. A man covenants that neither he nor his heirs shall erect any mill in such a place, and afterwards he erects a mill, and an action of covenant is thereupon brought by [against] the heir, and well. 4 H. 3. 57. And so it is if the lessor ousts the lessee and dies, or tenant in tail leases for years and dies, and the issue ousts the termor, he shall have covenant against the executors. F. N. B. 145. (D) in the new notes there (a) cites 47 E. 3. 22. 48 E. 3. 2. but 38 E. 3. is, that he shall recover the whole in damages against the heir if he has assets by descent, per Knivet and Skipwith.

3. Covenant does not lie against the heir upon a lease by deed of his ancestor, if there is not express warranty in the indenture of the lessor and his heirs, and also that the heir has assets. Br. Garrantries, pl. 89. cites 32 H. 6. 32.

4. But where a man covenants to make a house, and does not do it, but dies, covenant lies against executors, and not against the heir, because there is no express warranty against the heir, and yet it lies against the testator himself, for he broke the covenant. Br. Garrantries, pl. 89. cites 32 H. 6. 32.

5. A bond of 1600l. penalty entered into 19 Jac. to perform covenants in an indenture, the covenantors to pay 77l. per ann. till 1100l. be paid, but the covenants not being performed, the plaintiff sues the bond against the heir of the obligor. This Court declared, that the 1100l. and interest thereupon, ought to be paid, and by the consent of the parties ordered and decreed, that the 1600l. the penalty of the said bond, be paid by the said defendant to the plaintiff, in full of all the principal and interest, and 40l. costs. Chan. Rep. 201, 202. 13 Car. 2. Wake v. Calley.

6. The lien of a covenant must be measured by the estate in the rent or thing granted; per Withens J. 2 Show. 334. Mich. 35 Car. 2. B. R. in Case of Fountain v. Guavers.

Executor.

(E) [Where it lies against an Executor, though not named.]

1. IF a man covenants, that A. shall serve B. as an apprentice for 7 years, and dies; if A. departs within the term, a writ of covenant lies against the executor of the covenantor, without naming. 48 E. 3. 2.

Br. Cove-
nant pl. 12.
cites S. C.—
Fitzh.
Covenant
pl. 21. cites

48 E. 3. 22. [But See (D) pl. 1. Supra, and the notes there.]

2. Covenant

2. Covenant was was brought *against two executors*, inas-
much as their testator put one to the plaintiff to be his *appren-*
tice who *departed within the term*, and it was awarded that one
[383] executor shall not answer without the other; for the one ap-
peared and other not, and the statute does not remedy but in
debt and detinue, and therefore by this judgment it seems that
covenant lies against executors. Br. Covenant, pl. 11. cites
47 E. 3. 22.

3. If *tenant in tail leases for years and dies*, and the *issue ousts*
the termor, he shall have covenant against the executor,
which Finch. denied. Ibid.

4. In covenant against executors the plaintiff counted that
the *testator put his son to the plaintiff for 7 years apprentice*, and
bound himself to the covenant without mentioning his executors,
and that *after the death of the testator the son departed without*
leave within the term, and came to the executors and they
retained him; and per Persey covenant does not lie against
the executors; for it does not lie against any, but against
him who is party; as this word *dedi* is no warranty to bind
the heir, but only him who made it, and so shall not bind
executors where executors are not mentioned in the deed;
but Finch, contra, but Wich. was clear that the executor
is not bound, if executor be not named in the deed. Per
Kirtop if a man covenants to serve another for 7 years and
dies within the term, the covenant is discharged by the death
of the party. And per Persey where a man leases for years
without warranty, and the termor is ousted, the termor shall
not have covenant; but Finch, contra clearly. Br. Covenant,
pl. 12. cites 48 E. 3. 1.

5. If the *lessee for years covenants for him to repair the houses*
leased within 6 years, and dies within the 6 years, yet his ex-
ecutors shall make the reparation, for it may be made by the
executors within the 6 years as well as by himself; and so see
executors bound though he does not express the executors in
the covenant, but if the covenant had been to have been per-
formed by himself during his life, the executors shall not be
charged. Br. Covenant, pl. 50. cites 10 H. 7. 18.

6. Termor covenants *to build a new house*, lease expires and
lessee dies, yet his executor is chargeable. Lat. 261. cites
D. 14. s. pl. 69. Trin.
28 H. 8.
Anon. S. C. D. 14.

7. *A. tenant for life remainder to B. in fee*, the *lessee for*
life makes a lease for years by (dedi & dimissi) rendering rent by
indenture and dies within the term, he in remainder enters; the
lessee for years brings covenant against the executors of A. Welch,
Brown, and Dyer, held that it did not lie against the execu-
tors; 1st, Because it is not shewn, that he was possessed at
the time of the entry of him in the remainder, but only by
implication. 2dly, For that without an express covenant
the executor shall not be charged in this case; for the *cove-*
nant in law expired with the term. But Weston e contra, be-
cause

D. 14. s. pl.
69. Trin.
28 H. 8.
Anon. S. C.
Mo. 74.
pl. 204.
Swan v.
Scarles S. C.
adjudged
that the ac-
tion did not
lie.—And.
1s. pl. 25.
SEARLES v.
STRAN-
GHAM, S. C.
adjudged

cause the lease was by indenture. But judgment was afterwards given against the plaintiff. D. 257. a. b. pl. 13. 14. Mich. 9 Eliz. according-ly.—S. P. ruled accordingly on demur-

rer to the declaration, because no express covenant or warranty of the term was comprised in the indenture, but only a naked covenant in law. D. 257. b. at the end of the principal case cites Trin 22 Eliz. Broderidge v. Windsor. —And 12 cites S. C. accordingly. —F. N. B. 145 (M) in the new notes there (c) cites S. C.

If *lessee for life leases for years and dies within the term, so as the lessee is evicted by him in remainder or reversion.* It was resolved per 3 J. that by this covenant in law the executors were not liable. Wentw. Off. Ex. 125. and says, that in the same case Ld. Dyer sets down another resolution after, to the same effect.

But Serjeant Benloe reporting this later case to be of a *lease made by tenant in tail, before the Statute 32 H. 8. or not warrantable by it* sets down the opinion contrarily, viz. that the action was maintainable against the executors. Wentw. Off. Ex. 125. —Beadl. 150. pl. 208. Mich. 7 & 8 Eliz. Scramham v. Scarles. S. C. that this action does not lie against the said defendants, and cites D. 257. pl. 14.

But if the *eviction or breach of covenant is in the life of testator himself*, no doubt [384] but the executor is chargeable. Wentw. Off. Ex. 125. —D. 257. a. Marg. pl. 13. [384] says that such judgment was given. Trin. 22 Eliz. Rot. 659. in Case of BROWNING v. WINDSOR in Suffolk, the opinion then was, that this action lies against the executor of the lessor, who was tenant in tail. —Ibid. cites Pasch. 41 Eliz. Rot. 194. B. R. NOKES v. JAMES, where it was ruled accordingly, where tenant per autre vie made a lease for years, and celsy que vic died during the term.

8. But if *A. seised in fee makes a lease for years and dies, and the heir ousts the lessee*, he shall have covenant against the heir, for this covenant in law, by reason of the privity; per Brown. D. 257. b. in the Case above.

9. *Lessee of a term of a flock of sheep covenants for him and assignees, covenant lies not against assignee* because it is personal, but it binds executors. Lat. 261. cites 5 Rep. 17. [Pasch. 25 Eliz.] Spencer's Case,

10. *Lessee for years of a house covenants to repair it within 6 years, within which term he dies, no reparation being made.* Covenant lies against executors; otherwise if the covenant had been to repair during life. Per Cook. Arg. 4 Le. 171.

11. *Covenant by lessee to repair the buildings, or to pay the quit rents* issuing out of the land, executor must do it though the covenant mentioned nothing of executors, though opinions have been otherwise, and that it was only a personal covenant, and cites 5 Rep. 24. [Mich. 43 & 44 Eliz. B. R.] WINDSOR v. HIDE, which at first seemed strong to that purpose, but at last it was resolved to be a covenant running with the estate, and so both executor and assignee bound to perform it. Wentw. Off. Ex. 124.

12. Wentw. Off. Ex. 124. says, that in the said Case of WINDSOR v. HIDE (5 Rep. 24.) [Mich. 43 & 44 Eliz. B. R.] it was said per Popham Ch. J. that if the covenant had been *to do a collateral act*, neither the executor nor assignee had been bound, and therefore a covenant by lessee for years *to build a new house upon the land within two years and dies within the time*, he doubted if the executor be bound to do it or not, though it concerns the land lot, so as the rent or fine was the less in respect of the charge of the new buildings;

ings; but if the covenant had been to build it *elsewhere than upon the land let*, or to *do any other collateral thing not pertinent to the land let*, it is clear the executors are not bound; yet, if the time expired in lessee's life, and the covenant not performed, the executors are liable to damages in action of covenant as the Judges agreed, though not reported by Lord Coke, who reported only the point in question.

13. If a man makes a *lease by these words (demise and grant)*, and dies, an action of covenant lies not against his executors, as it is said in 9 Eliz. D. 257; but otherwise upon express covenant; per Coke Ch. J. 2 Brownl. 214. Hill. 7 Jac.

14. Q. Eliz. made a lease for years, rendering rent, and the lessee covenanted to pay it. The Q. died and the reversion descended to K. James. Afterwards the *lessee assigned over the term*, and the *assignee paid the rent to the king*; the king granted the reversion by his letters patents; the patentee accepted the rent of the assignee; the patentee brought action of covenant against the executors of the first lessee, and adjudged maintainable, which must necessarily be by reason of the privity of contract transferred by force of the said Statute of 32 H. 8. cap. 34. For there was no privity of estate between them, the first lessee having assigned his term before the grant of the reversion to the patentee, which proves that by the statute *the privity of contract is transferred*; cited per Cur. Saund. 240, 241. Pasch. 21 Car. B. R. as Cro. J. 521, 522. [pl. 7. Hill. 16 Jac. B. R. Brett v. Cumberland.]

[385] 15. Lease for years, *yielding and paying rent &c.* the *lessee died*. In covenant against his executor, exception was taken that this was a mere covenant in law, comprised only in the words yielding and paying, and not an express covenant to pay it; but Roll Ch. J. answered, that *covenant lies against an executor upon a covenant in law*, though he be not named, though otherwise of an heir; for he is not bound by such a covenant. Sty. 387. Mich. 1653. Newton v. Osborne.

Keb. 155. 16. In covenant against an executor upon a *writing sealed by testator, whereby he covenanted to be accountable for all monies as should be charged by him upon A. payable to B.* The Court held that the action well lay, and that it would do so upon *any words purporting an agreement for payment of money*. Lev. 47. Mich. 13 Car. 2. B. R. Brice v. Carre and Emerson, and not covenant for money so delivered; but per Cur. there is no other remedy against executors, and had it been against the party himself, such agreement being by one person to pay money charged upon J. S. for which an account lies not, he being not chargeable as receiver or bailiff, the only remedy is by covenant. Judgment for the plaintiff.

10 Mod. 12. 17. *Executrix of a termor for years assigns all the residue of the said term to P. reserving a rent, and P. covenanted to repair.* P. dies, and P's. executrix enters &c. Parker Ch. J. held, that P's. executrix may be charged either as executrix or assignee, but that plaintiff having charged her as executrix,

trix,

10 Mod. 12. S. C. that if an executor takes possession of the term of the testator,

trix, judgment can be only against her as executrix. 1 Salk. 316. pl. 25. Trin. 9 Ann. B. R. Buckley v. Pirk.

tator, and
an action is
brought
against him

in the debet & detinet for rent or non-repairs, it is absurd for him to plead no assets ultra what will satisfy such and such judgments, because in such a case the surplus of the profits, rents, and repairs deducted, is all that is assets, and liable to the judgment, and therefore the rest of the profits are so appropriated to the payment of rents and repairs, as not to be exhausted by debts.

(F) *Covenant in Law.* In what Cases the Law will create a Covenant *without the Words of the Party.*

[1.] If a man leases for years, and cusses the termor, he shall have covenant against him, though there be no express covenant in the deed. * 48 E. 3. 2. b. + 7.]

Br. Cove-
nant, pl. 12.
cites S. C.
& S. P. per
Parfey, that

Termor shall not have covenant, but Finch. e contra clearly. — Fitzh. Covenant, pl. 21. S. P. by Parfey, (ut supra) but Finch. said it was an erroneous opinion.

+ Br. Trespas, pl. 65. cites S. C.

[2. If a man leases certain goods for years by indenture, which are cussed within the term, yet he shall not have a writ of covenant; for there the law does not create any covenant upon such personal thing. Contra Mich. 37 Eliz. between Bedford and Bull.]

Ow. 104,
105. Bed-
ford v. Hall,
S. C. and
Fenner and
Gawdy
held, that
action of

covenant would not lie, but Clench seemed e contra; sed adjournatur.

3. If a man leases land for years without warranty, and the lessee is ousted by J. N. by title, there he shall not have writ of covenant against his lessor, for he has not broke the covenant there; contra if he had made thereof warranty, but contra per Needham J. though no warranty be in the deed, yet writ of covenant lies. Brooke says, and so see here, and often elsewhere, that writ of covenant lies often upon indenture without this word (covenant.) Br. Covenant, pl. 38. cites 32 H. 6. 32. And so it was said per Justiciarios. P. 1 M. 1. [386]

4. If a man leases for years, rendering rent, this is a covenant in law. Per Coke Ch. J. 2 Brownl. 215. cites Dyer 15 H. 8. See (C) pl. 10. supra.

5. Lease is made for years, and the words are such, and the lessee shall do such a thing, these words imply covenant without any thing more; per Cur. Mo. 135. in pl. 280. Trin. 25 Eliz.

6. That apprentice shall be loyal, & secreta sua velaret & similia, without other words of covenant expressed, those words imply covenant. Mo. 135. pl. 280. Trin. 25 Eliz. Stanton's Case.

7. Action of covenant lies upon the words demise and grant, in an indenture of lease, though there are no other words comprehending a warranty in them. Resolved by all the Justices.

Cro.

Cro. J. 73. pl. 1. Trin. 3 Jac. B. R. in Case of Stile v. Herring.

S. C. cited
Show. 389.

8. A man made a *lease* for years, with exception of divers things, and that the *lessee* shall have *conveniens lignum non succidendo &c. vendendo arbores &c.* Now the *lessee* cut down trees, and the lessor brought an action of covenant; and the opinion of the Court was, that the action would lie, and that it is as a covenant on the part of the lessee, because the law gives him reasonable estovers, and by this covenant he abridges his privilege. Mar. 9. Pasch. 15 Car. Anon.

So if a lease
be made of
an house and
estovers; if
the lessor
destroys all

9. If a man grants a *water-course* by deed, and the grantor stops it, the grantee shall have an action of covenant; per 3 Justices, and agreed by Twifden. Saund. 322. Mich. 21 Car. 2. in Case of Pomfret v. Ricroft.

of which &c. covenant lies. Ibid. per 3 justices, which Twifden J. agreed.——
So if a man demise a middle room in an house, and afterwards does not repair the roof, so as the lessee cannot enjoy the middle room, covenant lies; per Rainsford. But Twifden J. said, that these are voluntary acts of the lessor or grantor, and it is a *misfeasance* in them to annul and defeat their own grant; but that in the principal case [which was a demise of a house, with the use of a pump, which he suffered to be out of repair, so that it became useles], there is only a *non-feasance*, for which no action lies; as if I grant a way over my land, I am not bound to repair this, but if I voluntarily stop it, an action lies against me for the misfeasance. Judgment was given in B. R. according to the opinion of three justices, but was afterwards reversed in Cam. Scacc. for the reasons given by Twifden. 1 Sand. 322. Mich. 21 Car. 2. B. R. in Case of Pomfret v. Ricroft.——Sed. 489. 490. pl. 17. S. C. adjudged, and judgment reversed.——Vent. 44. 55. S. C. adjudged in B. R. by three justices, contra Twifden.——2 Keb. 569. pl. 77. B. R. the S. C. adjudged for the plaintiff.

10. If a *lessor* enters upon the lands leased, and cuts down the timber trees, and carries them away, whereby the lessee loses the lops and shade of them, yet he shall not have covenant, but he may have trespass, or an action sur case upon his special damage; and in the principal case the lessee might repair the pump; for though the soil, or the pump, be not granted, yet when the use is granted all is granted whereby the grantee may have and enjoy such use; per Twifden J. Saund. 322. Mich. 21 Car. 2. B. R. in Case of Pomfret v. Ricroft.

11. In articles of agreement for a marriage, and payment of 6000*l.* portion, these words, viz. *Whereas it is intended to levy a fine &c.* amount to a covenant to levy a fine; per Finch C. 2 Mod. 91. Pasch. 28 Car. 2. in Canc. Hollis v. Carr.

12. If the *lessee* be *distraigned by the lord paramount*, though he cannot have a writ of mesne, yet he shall have a writ of covenant in lieu thereof. Raym. 257. Hill. 30 & 31 Car. 2. C. B. and cites Mich. 2 H. 6. 1. b.

[387]

Reserva-
tion of rent
is as a co-
venant on
lessee's

13. Covenant will lie on a *reservation*; as where rent, or such a room with a passage to it, is reserved, covenant will lie on the words of reservation *without any express* words of covenant. Carth. 232. Pasch. 4 W. & M. in B. R. Bush v. Coles.

part; per
Gawdy. Cro. E. 657. cites D. 37. 21 H. 7. 37.——11 Rep. 51. a.——See title Conditions (X. a) pl. 1. and the notes.

14. Per Holt Ch. J. the very *referring a thing to arbitration* is a mutual undertaking, that each party shall perform his part of the award; for otherwise it cannot be said to be referred. 11 Mod. 170, 171. pl. 8. Pasch. 7 Ann. B. R. Lapart v. Welfon.

15. If a man *assigns a bond*, and afterwards *brings an action thereon in his name*, this is a breach of the agreement; for the *very assignment imports a covenant*, that the assignee shall bring the action in the assignor's name, and recover, and have the money to his own use. 11 Mod. 171. pl. 8. Pasch. 7 Ann. B. R. Lupart v. Welfon.

(G) In what Cases the Law will create a Covenant.

Fol. 580.

[1. If a man leases to me by indenture the land of J. S. of which J. S. was seised at the time, upon which I enter, and he re-enters, I shall have a writ of covenant upon this indenture, though I was not in the land by the lease, but by estoppel; for the lessor is estopped to say, that I was not in of his lease. Trin. 3 Jac. B. R. between *Stile and Herring* adjudged, and that such traverse is not good.]

Cro. J. 73. pl. 1. S. C. adjudged. — See tit. Estoppel, (N) pl. 1, a. S. C.

[2. So for the cause aforesaid, if a man leases to me my own land, of which I am seised in fee, or otherwise by indenture, if I am ousted by another that hath right, I shall have a writ of covenant. Tr. 3 Ja. B. R. in *Stile and Herring's Case*, per Curiam.]

Cro. J. 73. pl. 1. S. C. but S. P. does not clearly appear, though it

seems to be admitted.

[3. When a man leases to me the land of J. S. of which J. S. is seised at the time, I shall have a writ of covenant before entry upon J. S. and re-entry by him, for I need not allege an eviction; for this is a covenant in law, which is broke when he is not seised of the land at the time of the demise; for the word *demise* imports a power of letting, and it is not reasonable to enforce the lessee to enter into the land, and so to commit a trespass. Hobart's Reports 18. P. 11 Jac. between * *Holder and Taylor* adjudged. Contra Tr. 3 Ja. B. R. in † *Stile's Case* before cited.]

* Hob. 12. pl. 24. S. C. and the whole Court was of opinion, that the action did lie; but that if it were an express covenant for quiet enjoyment, there

perhaps it were otherwise. — Brownl. 23. S. C. but S. P. does not appear. † Cro. J. 73. pl. 1. S. C. — See supra pl. 1.

[4. If a man leases the land of J. S. by deed to J. D. J. S. being in possession of the land at the time of the lease, and the lessee enters upon J. S. who re-enters, yet J. D. shall [not] have any action of covenant thereupon, because the covenant in law ought to be fixed upon an estate, but here was no estate, for it was a void lease, and the lessee a disseisor by his entry. Mich. 37 Eliz. B. R. in *Ward's Case*, per Fenner.]

Ow. 105. S. P. per Fenner, in the Case of Bedford v. Hill. 36 Eliz. B. R.

If a man leases lands and goods, of which goods the lessor was possessed, although by a wrong title, and afterwards the owner seizes them, an action of covenant will lie; per Fenner. Ow. 125. 36 Eliz. B. R.

[5. So if a man leases certain goods to J. D. which are the goods of another, and in his possession, if he cannot enjoy them, yet he shall not have any covenant against the lessor, because he was never a lessee. Mich. 37 Eliz. B. R. *Were's Case*, dubitatur.]

Ow. 105. 36 Eliz. S. P. by Fenner, in Case of Bedford v. Hall.

[6. If a man leases land for years, and a stranger enters before the lessee enters, he shall not have an action of covenant upon this ouster, because he was never a lessee in privity to have the action. Mich. 37 Eliz. per Fenner.]

7. Indenture of lease recited, that in consideration H. the lessee should build a mill upon the land demised, and a water-course by the land demised, F. the lessor (the defendant) leased the said land to H. (the plaintiff) by the words *dedi & concessi*. The plaintiff assigned the breach of the said covenant in law, in that the defendant had stopped the said water-course so made by the plaintiff, but in the indenture there is not any express covenant, clause, or agreement that the lessee should enjoy the water-course so made, but only the covenant in law arising from the words *dedi & concessi*, which, it seems admitted, cannot extend to a thing not in esse at the time of making the indenture. Le. 278, 279. pl. 377. Hill. 28 Eliz. B. R. in Case of Huddy v. Fisher.

8. Bill of sale of goods for 48l. 10s. with a warranty and covenant &c. breach assigned, that at the time of sale the defendant had not the possession or property of the goods. Demurrer to the declaration, & judic. per quer. in C. B. Writ of error in B. R. because it could be no breach; for the intention of the covenant was only to secure the possession, so that till eviction the covenant was not broken. Parker Ch. J. said, that the plaintiff cannot use the goods without being liable to an action, which is a damage. If the case had been, that the defendant had had the equitable right, but another the legal one, it had been proper to have laid it before the Court by pleading it; and Eyre J. said, that warranty, in the nature of it, imports as well warranty of the property as possession, and judgment affirmed. 10 Mod. 142. Hill. 11 Ann. B. R. Hacket v. Glover.

(G. 2) What is a Real and what a Personal Covenant.

1. WRITS of covenants are of divers natures, for some are merely personal, and some covenants are real, to have a real thing, as lands and tenements; as a covenant to levy a fine of land is a real covenant. But a writ of covenant, which is mere personal, is, where a man by deed does covenant with another to build him a house &c. or to serve him,

or

or to *infeoff* &c. and he does not the same according to the covenant, then he with whom the covenant was so made shall have a writ of covenant against him; and there is a note in the register, which is this, *A writ of covenant ought not to be made according to the law merchant without a deed*, because no plea of covenant can be without deed, and every man ought to be judged according to his deed, and not by another law: F. N. B. 145. (A).

2. *Lessor covenants to pay quit-rents during the lease*, and dies; They are bound. *quære*, if the executors of lessor are bound to pay them. D. Went. Off. 114. pl. 60. Pasch. 2 & 3 P. & M. Anon. Ex. 123.—Lessor co-

venanted to repair and allow all taxes; his grandson and heir being only tenant for life, is not liable to those covenants. Fin. R. 86. Hill. 25 Car. 2. Woodward v. Earl of Lincoln.

3. A. conveys a manor to 3, and covenants with them, & *quolibet eorum*, that he has conveyed a good estate to them; this is a real covenant, and goes with the estate, and therefore after partition, and by reason of the word (*quolibet*) the said feoffees may have several actions of covenant. Jenk. 252. pl. 63. cites 5 Rep. 18. b. Slingby's Case. [389]

4. Three coparceners purchase land in fee, and mutually covenant for them and their heirs, with them and every of them, and their heirs, that survivors shall convey to the heirs of such as shall die first, at the costs of such heirs. Resolved, that this is a real covenant, and goes to the heir of covenantee. Jenk. 241. pl. 24. And. 53. pl. 13a. Hill. 16 Eliz. Wor-ton v. Cook, S. C. — Bendl. 228. pl. 260.

S. C. and the pleadings. — D. 337. b. 338. a. pl. 39. S. C.

5. A. grants lands, and covenants that the lands shall be discharged of the rent, it is no more than an ordinary and personal covenant, which must charge the heir only in respect of assets, and not otherwise, and thereupon the bill was dismissed. Hard. 87. pl. 5. Mich. 1656. Cook v. the Earl of Arundel. Sale of 14 shares out of 36 shares in the New Riverwater, which 36 shares were charged with a rent

of 500l. per ann. to the crown in fee, and 100l. per ann. to H. M. for life; and Sir Hugh, in his agreement with B. had covenanted to discharge the 14 shares he had agreed to sell B. from those rents. Decreed that the plaintiff should enjoy the 14 shares discharged of those rents, and that the other 22 shares should be subject to the plaintiff's indemnity therein, notwithstanding it was insisted that Sir Hugh's covenant to discharge the 14 shares of those rents was merely personal, and did not, nor could charge the whole rents upon the 22 shares. Chan. Cases 212. Trin. 23 Car. 2. Lord Cornbury v. Middleton.

6. Covenant * to renew a lease for years, or lives, binds the land. Chan. Cases 260. Pasch. 27 Car. 2. Tanner v. Florence. 9 Mod. 58. S. P. Ash-ton v. Bret-land. — A. leases to

B. for three years, and in consideration of B's laying out 100l. in improvements, covenants at the end of the term to grant a new lease at the same rent and covenants. . purchases the inheritance. Decreed that C. make good the covenant. a Vern. 447. pl. 411. Mich. 1703 Richardson v. Sydenham.

* And it will lie for assignee of the term against the grantee of the reversion; Arg. Show. 194. cites And. pl. 148. — Fin. R. 212. Finch v. E. of Salisbury, S. P.

7. Covenant in general to settle lands of such a value, and names none, this binds all the lands; but where a man settles such lands in particular for a jointure, and covenants that they are of such a value, there such covenant binds the person only, and not the land; per Mr. Keck, counsel; and decreed accordingly. Vern. 64. pl. 60. Mich. 1682. Girling v. Lee.

Abr. Equ.
Cases 27.
pl. 4. S. C.
in totidem
verbis.

8. A. granted a water-course to B. and his heirs through B1. Acre and Wh. Acre, and covenanted for himself, his heirs, and assigns, to cleanse the same, and that fines and recoveries levied &c. of the said grounds should be, and enure to confirm &c. the said water-course. Afterwards a recovery was had, and a deed executed, declaring the uses as aforefaid. The Court held, that this was a covenant running with the land, and made good by the recovery. Chan. Prec. 39, 40. pl. 41. Hill. 1691. Holmes v. Buckley.

1 Salk. 198.
pl. 4. Brew-
ster v.
Kidgell.
S. C. & S. P.
by Holt Ch.
J. ———
But the
other three
judges

9. If tenant in fee grants a rent charge out of lands, and covenants to pay it without deduction, for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against the assignee, for it is a mere personal covenant, and cannot run with the land; per Holt Ch. J. Lord Raym. Rep. 322. Hill. 9 W. 3. in Case of Brewster v. Kitchin.

thought that this covenant might charge the land, being in a nature of a grant, or at least a declaration going along with the grant, shewing in what manner the thing granted should be taken, and this being by indorsement, they reckoned the indorsement as part of the deed, and so judgment was given for the plaintiff. 12 Mod. 171. in S. C.

[390] 10. Lessee for 6 years covenanted to dung and lime the land *durants termino*. The Court was of opinion, that this was a covenant relating to the land, and for the advantage of the reversion, and would have gone to an assignee without his being named in the covenant, and attends upon the reversion, and the heir may bring an action upon it. 10 Mod. 158. Pasch. 12 Ann. B. R. Sail v. Kitchingham.

(G. 3) What a Contract, and what a Covenant.

1. CONTRACT made by A. with 20 others, that A. *shall have all the wool growing* of their sheep, or all the skins coming of their beasts killed, or *all the milk* of his cows, this is not contract, but covenant. Mo. 174. pl. 307. Mich. 25 & 26 Eliz. Anon.

Pl. C. Arg.
308. S. P.

2. Covenant is when a man covenants by deed to do, or that he has done some thing; as to make a feoffment &c. But if I covenant and grant with you, that *my black horse shall henceforward be your horse*, you shall have no action of covenant against me, though I retain the horse; for I have not covenanted to do any thing in futuro, nor that any thing was done in time past. Finch. 49. b.

(H) What

(H) What Persons shall have the Advantage of a Covenant. The Heir.

- [1. **T**HERE are some covenants, of which none shall have advantage but the party or his heirs. 42 Ed. 3. 4.] Fitzh. Covenant, pl. 17. cites S. C. & S. P.

by Thorp, and so he says of some inhabitants [tenants] of the land, so that every one that has the land shall have the covenant.

- [2. Covenants of inheritance shall descend to the heir.]

But where there is an alienation of the estate to which &c. the alienee shall have covenant. Br. Covenant pl. 5. cites 42 E. 3. 3. — Fitzh. Covenant pl. 5. cites 42 E. 3. 3.

- [3. *As if an abbot covenants, and hath used time out of mind to sing in the manor of B. for him and his servants, his heirs shall have advantage of this covenant, if B. does not alien.* 42 Ed. 3. 3.] Fitzh. Covenant, pl. 17. cites S. C. — Br. Covenant, pl. 5. cites S. C.

- [4. [So] If an abbot and convent covenant to sing for the covenantee, and his heirs in such a chapel, his heirs at all times shall have a writ of covenant for the not doing thereof. * 2 H. 4. 6. b. adjudged Co. 5. Spencer 18.] * Br. Covenant, pl. 17. cites S. C. But Brooke says that it seems if the

Lord aliens his manor, the heir shall not have covenant. — Fitzh. Covenant, pl. 13. cites S. C.

5. If a man make a covenant by deed to another and his heirs to enfeoff him and his heirs of the Manor of D. &c. now if he will not do it, and he, to whom the covenant is made, dies, his heir shall have a writ of covenant upon that deed. And also his assigns shall have a writ of covenant where the covenant is made to him and his assigns. F. N. B. 145. (C) If I covenant with A. and his heirs to convey land to him and his heirs, there the feoffment shall

be to the heir; for the heir shall have covenant; per Hyde Ch. J. Palm. 558. Trin. 4. Car. B. R. cites Laughter's Case. — S. P. And. 55 Hill. 16 Eliz. in pl. 3a. Wootton v. Cook S. P. and judgment for the plaintiff; because in the register is a writ of [59] covenant for the heir in the same and like case, and for that the intent of the covenant is to have the inheritance conveyed to the heir, which covenant, had it been performed, the heir would have advantage of whatever by the performance of the covenant would have accrued; and by the same reason he shall have the damages which accrue by the non-performance thereof, and therefore, and because there is privity enough between the father and his heir to convey the action, judgment was given as before.

6. If A. covenants with F. S. and his heirs to make a conveyance to one and his heirs, his heir cannot have covenant, because it is a covenant in gross; but otherwise it is where such covenant is in another conveyance, and goes with the estate. Palm. 558. cites it as said by Jones J. Pasch. 4 Car.

7. A. conveyed land to B. in fee and covenanted with him, his heirs and assigns, for quiet enjoyment. B. was ejected, and died, and his executors brought action of covenant; resolved that Vent. 175. S. C. and agreed by all the just.

times that the action was brought by the executor for damages.—
Freem.

Rep. 103.

pl. 121. S. C. but S. P. does not appear.

the eviction being of the testator, he could not have either heir or assignee of this land, but the *damages shall be recovered by the executors though not named in the covenant*; because they represent the person of the testator. 2 Lev. 26. Mich. 23 Car. 2. B. R. Lucy v. Lavington.

{
Fol. 521.
}

(I) [Who shall have advantage of the
Covenant.]
The Assignee.

[1. IF a man leases land to another by indenture, this covenant in law, created by the word (*demise*) shall go to the assignee of the term, and he shall have advantage of it. Contra, Mich. 32 El.]

S. P. and seems to be S. C. cited as adjudged, per Gawdy. Mo. 59. pl. 300.

2 A. by indenture let an house to J. S. for 40 years. The lessee covenanted, with the lessor, *that he would repair the house during the term*; and [lessor covenanted that] *if it should be repaired upon the view of the lessor, then the lessee should hold the lease during 40 years after the first years ended*. J. S. granted over his term by these words, Totum interesse terminum & terminos quæ tunc habuit in tenementis illis. Catlin held that the possibility of taking the last 40 years was inherent to the land and term, and should go the assignee, but three other Justices held, that the words (totum terminum &c. quæ tunc habuit &c.) did not extend to the possibility of the future term, but that the assignment was a separation between the first term, and the possibility of the 2d, and consequently determined; for it could not stand in grofs divided from the term to which it was first annexed. But they all resolved that *the want of the word (assigns) did not hinder the possibility*; for it was a thing inherent which passed without such word, but yet they held if there had been the word (assigns) yet the assigns could not have taken the possibility. Mo. 27. pl. 88. Pasch. 3 Eliz. B. R. Skerne's Case.

3. Upon the words *demise, grant &c.* the assignee shall have covenant, though but a covenant in law. 4 Rep. 80. b. Trin. 41 Eliz. Noakes Case, al. Nokes v. James.

4. Lessee for years makes a lease for part of the term, the under-lessee covenants not to do such an act, and then lessee grants his reversion. The question was, if the covenant passed to the grantee or remained with the grantor. It was insisted that the words of the Statute H. 8. are affirmative only that the grantor shall have action on the covenant, and that this in reason ought to imply a negative, that the grantor shall not have action thereupon, and not to subject the lessee after assignment to two actions; but to this the Court delivered no opinion, because the assignment of the reversion not being pleaded to be by deed, it was void, notwithstanding lessee had attorned, and for this reason judgment

judgment was given for the plaintiff, notwithstanding what else was alleged. 3 Lev. 154. Mich. 35 Car. 2. C. B. Beely v. Purry.

(K) In what Cases the Assignee shall have Advantage of a Covenant.

[1. **T**HERE are some covenants that none shall have advantage of but the party to the covenant, or his heirs. Br. Covenant, pl. 5. cites S. C. — Fitzh. 42 Ed. 3. 4.] Covenant, pl. 17. cites S. C.

[2. There are some covenants which have an inheritance of the land, which shall pass with the land. 42 Ed. 3. 4.]

[3. As if a prior covenants with B. to sing in a chapel in his Manor of D. for him and his servants (in fee, as it seems to be intended) the assignee of the manor shall have covenant for a default. * 42 E. 3. 3. b. Co. 5. Spencer 17. b. because it is annexed to manor. † 2 H. 4. 6. b.] Br. Covenant, pl. 5. cites S. C. but Brooke says that it seems if the lord aliens his

manor, the heir shall not have covenant, but in this case, the assignee, who was a younger brother to the heir, and had purchased the manor, brought his action as heir to his grandfather, who was the grantor and covenantee, whereupon the defendant pleaded in abatement of the writ, to which the plaintiff replied that he is infeoffed of the manor, and so is tenant, but this point was not adjudged, but it was admitted this is a covenant which goes with the land. — Fitzh. Covenant, pl. 17. cites S. C. — Thel Dig. Lib. 1. cap. 21. pl. 3. cites Hill. 42 E. 3. 3. & 2 H. 4. 16. S. P. — Co. Litt. 385. a. S. P. cites the same cases and 6 H. 4. 1. & 2. — † Fitzh. Covenant, pl. 13. cites S. C. Br. Covenant, pl. 17. cites S. C.

[4. But if the covenant be to sing in the chapel of a stranger, the assignee shall not have covenant. 2 H. 4. 9. adjudged, Co. 5. Spencer 18.] Fitzh. Covenant, pl. 13. cites S. C. — Br. Cove-

nant, pl. 17. cites S. C. as if the chapel is severed from the manor, it seems that the assignee shall not have covenant, for want of privity of blood. — Co. Litt. 385. a. S. P. and cites S. C.

[5. Upon equality of partition, if one coparcener covenants to acquit the other and her heirs of suit, the assignee of the land shall have benefit of this covenant. * 42 Ed. 3. 3. b. Co. 5. Spencer 18.] * Br. Covenant, pl. 5. cites S. C. — Fitzh. Covenant, pl. 17. cites

S. C. — Co. Litt. 384. b. 385. a. S. P. and cites S. C. by Finchden. — 5 Rep. 18. a. S. C. cited by the reporter, and says the reason is, because the acquittal falls upon the land.

[6. If A. seised of lands in fee conveys it by deed indented to B. and covenants with B. his heirs and assigns to make any other assurance upon request, for the better settlement of the land &c. and after B. conveys it to C. who conveys it to D. and after D. requires A. to make another assurance according to the covenant, and he refuses. D. shall have an action of covenant in this case against A. by the common law, as assignee to B. Tr. 14 Car. B. R. between Midlemore and Goodale, upon a demurrer admitted and agreed per Curiam, but judgment was given against the plaintiff for another cause.] Cro. C. 503. pl. 4. S. C. & S. P. agreed per Cur. and judgment nisi. — Ibid. 505. pl. 7. S. C. [393.] and exception taken, that

action was brought as assignee of assignee of the covenantee, and shews that the conveyance was made to the plaintiff, and Frances his wife, and to the heirs of the husband, and that he brings the action alone, without naming his wife, who is yet alive, and so not good, whereupon (absente Bampton. it was adjudged for the defendant. — Jo. 406. pl. 4. S. C. & S. P. held accordingly. — By action brought by the assignee attaches it so in his person that the covenantee cannot release it, he being interested in it; though before any breach or suit commenced a release by him had been a good bar to the assignee from bringing the action. Cro. C. 503. S. C. per tot. Cur. — S. C. & S. P. cited Arg. Skinn. 257.

7. None shall have advantage of *warranty real* but he who is *ter-tenant*; contra of *warranty personal*, as by writ of covenant; note the diversity, Br. Covenant, pl. 1. cites 26 H. 8. 3. per Cur.

F. N. B.
145. (M)
S. P. ac-
cordingly,
if the lease
be made to
the first
lessee and his
assignees with warranty,

8. Where covenant is made to *one and his assigns*, and where *lessee for years leases over* his term, the second lessee, if he be ousted, shall have action of covenant against the lessor. Thel. Dig. 18. Lib. 1, cap. 21, s. 4, cites F. N. B. Tit. Covenant.

9. Where a man *leases land habendum to the lessee and his assigns for 20 years*, the assignee shall have action of covenant against the lessor, by reason of the word (assigns) in the deed of the lease; and it was said there, that the assignee of the lease brought writ of covenant against the lessor where no assigns were expressed in the deed. Hill. 48 E. 3. and lay well; but this Case is not in the Printed Report. Br. Covenant, pl. 45. cites F. N. B.

10. B. covenanted, that if R. pay 400l. to him or his assigns before such a day, he would stand seised to his use in fee. Before the day B. infeoffed one W. of the land, at which day the money was tendered to W. Adjudged that it was due to him as assignee of the land, and not to B. who was the covenantor, Cited by Coke. Mo. 243. pl. 382. as 14 Eliz. in the Court of Wards. Randall v. Barker,

Mo. 185.
pl. 331.
Allen v.
Givers,
S. C. Mich.
26 Eliz.
and S. P.
held per
Cur. ac-
cordingly,
but for
defaults in
the avowry
they gave
judgment
for the
plaintiff to
have a return of the beasts.

11. A man made a *feoffment in fee, reserving rent, suit of court, and relief*, and by the deed granted, that if the *feoffee, his heirs and assigns, should be distrained for other services than* are reserved in the deed, that then it should be lawful for the *feoffee, his heirs and assigns, to distrain in the Manor of D.* and keep the distress till he was satisfied of so much as he had sustained in damage by the distress. The feoffee made a feoffment over. It was resolved, that in such case the *second feoffee might distrain*, because it was a covenant which ran with the lands; and if the word (assigns) had not been in, yet the word (heirs) would warrant the assignee to distrain; per Periam J. Mo. 179. pl. 318. Mich. 24 Eliz. Anon.

12. It was resolved, that the *assignee of an assignee* shall have an action of covenant; so the *executors of an assignee of an assignee*; so the *assignees of the executors or administrators of every assignee*; for all these are within the word assigns, for the same right

right which was in the testator or intestate shall go to his executors or administrators. 5 Rep. 17. b. Pasch. 25 Eliz. B. R. the 7th Resolution, in Spencer's Case.

13. If a man makes a *lease for years by the word concessit*, or *dimisit*, which imply a covenant, *if the assignee of the lessee be evicted, he shall have a writ of covenant*; for the lessee and his assignee have the annual profits of the land which accrue for the annual rent, and inasmuch as the assignee applies his labour, and employs his cost upon the land, and is evicted, [394] whereby he loses all, it is reason that he should take as much benefit of the demise and grant as the first lessee might, and the lessor has no other prejudice than what his special contract with the first lessee had bound him to. 5 Rep. 17. a. Pasch. 25 Eliz. B. R. the 4th Resolution in Spencer's Case.

14. A. leased to B. for years. B. covenanted that it should be lawful for A. his heirs and assigns to enter, and see in what reparations the houses were, and *that he and his assigns, within one month after notice, would repair*. The houses afterwards fell into decay, and A. granted the reversion over to C. for life * [in fee, who upon view gave warning.] C. as assignee of A. brought covenant; it was said the action did not lie, because the house became ruinous before his interest in the reversion; but Anderson and others e contra; because the covenant is, that after notice he would repair, and therefore be the house ruinous when it will, and in whose time soever, yet if he does not repair upon notice, he breaks the covenant. Mo. 242. pl. 380. Mich. 29 Eliz. Mascall's Case.

* Le. 62.
pl. 82. S. C.
held accordingly, per
tot. Cur.

15. A man was *possessed for the term of 6 years of a tavern* in London, and *leased the same unto another, for 3 years, and it was covenanted betwixt them, that during the 3 years quolibet mense, monthly, the lessee should give an account to the lessor of the wine which he sold, and should pay unto him for every tun sold so much money*; and afterwards the lessor granted the 3 years which were remaining of the 6 years to another, and he did request the lessee to account, and he would not, whereupon he brought an action of covenant; and the defendant pleaded, that he had accounted to the assignee of the 3 years, and upon that there was a demurrer joined; and the better opinion of the Court was, that it was no plea, because *it was not a covenant which did go with the land, or the reversion, but was a collateral thing, and did not pass by the assignment of the 3 years*. Godb. 120. pl. 140. Hill. 29 Eliz. B. R. Anon.

Mo. 243.
pl. 382.
Purfrey's
Case, S. C.
argued, but
not re-
solved.

16. *Lessee for years assigned over his term by deed to J. S. and covenanted that J. S. and his assigns should enjoy the land during the term without interruption of any. Afterwards J. S. assigned over his term by parol, and the assignee being disturbed brought covenant. Adjudged that it lies, although the assignment was but by parol, because there was privity*

Cro. E. 436,
437. pl. 52.
Mich. 37 &
38 Eliz.
B. R. Noke
v. Auder,
S. C. and
by Popham

and Fenner, of estate. Mo. 419. pl. 577. Hill. 33 Eliz. Awder v. Nokes.
when the estate passes, though it be by parol, the warranty and covenant ensues it, and the assignee of the estate shall have the benefit thereof; and Coke Attorney General, who was of counsel with defendant, said, that the law was clearly so. —S. cited 3 Rep. 63. a. as resolved accordingly, Pasch. 59 Eliz. B. R. in error on a judgment in C. B. per Popham and the whole Court, and upon conference had with divers other justices.

17. Where a *covenant is annexed to a thing, which of its nature cannot pass without deed* at first, in such case the assignee ought to be in by deed, otherwise he shall not have advantage of the covenant; but where the covenant is not so, but runs with the estate, the assignee shall have covenant without shewing any deed of assignment. Cro. E. 373. pl. 21. and 436. pl. 52. Hill. 37 & 38 Eliz. B. R. Noke v. Awder.

Mo. 419.
pl. 577.
Awder v.
Noke, S. C.
& S. P. ac-
cordingly.

18. Assignee of a lease by estoppel shall not have advantage of any covenant. Resolved by all the Justices. Cro. E. 437. Mich. 37 & 38 Eliz. B. R. in Case of Noke v. Awder.

Mo. 5-7.
pl. 695. Ma-
thuris v.
Westroray,
S. C. ad-
judged ac-
cordingly.

19. The assignee of the reversion of a term shall take advantage of a covenant against the lessee of a term; as if the second lessee covenants to leave the possession peaceably to the lessor, his executors or assigns, or to leave the premises in good repair &c. and though it was objected that the covenant was not broken until the term was determined, yet per Cur. *this is a covenant that runs with the land, and broken instantly with the determination of the estate*, but because he did not aver, that he had the reversion at the time of the grant, it was holden to be an apparent fault, and for that cause judgment was for the defendant. Cro. E. 599, 600. pl. 6. Hill. 40 Eliz. B. R. Matures v. Westwood.

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—A cove-
nant to do a
thing at the
instant of the
determina-
tion of the
term, as to
leave peace-
able posses-
sion to the lessor, his executors, administrators or assigns, is a covenant annexed to the estate, and runs with the land, and therefore the assignee shall have advantage over it; per Gawdy J. but Fenner J. contra, for that the estate is determined, and so no reversion, and so defendant now is but tenant at sufferance. Gouldsb. 176. Matures v. Westwood.

20. A, seised of lands in fee made a *lease for life, the remainder for life rendering rent, and after acknowledged a statute, and afterwards bargained and sold the reversion, and covenanted with the bargainee, his heirs and assigns, that it should be discharged within two years of all statutes and incumbrances, excepting the estates for life; the statute is extended, and thereupon the rent and reversion is extended; the bargainee grants the reversion to the plaintiff who brought covenant; resolved because the covenant was broken before the plaintiff's purchase, that the action was not maintainable by him against the defendant.* Cro. E. 863. pl. 40. Mich. 43 & 44 Eliz. Lewes v. Ridge.

21. If *lessee covenants to do any thing upon the land, as to build or repair a house*, there a covenant will lie for the assignee by the common law; but if it do not by the common law,

law, yet it is clear that it will lie by the Statute 32 H. 8. Resolved. Ow. 151. Mich. 8 Jac. in Case of Alfo v. Henning.

22. If lessee for years covenants to repair and sustain the houses in as good plight as they were at the time of the lease made; and afterwards, the lessee assigns over his term, and the lessor his reversion; the assignee of the reversion shall maintain an action of covenant for the breach of the covenants against the first lessee; per Woderidge J. and Mountague Ch. J. against the opinion of Haughton J. Godb. 270. 271. pl. 378. Hill. 15 Jac. B. R. Anon.

23. In debt for rent, and shewed that B. by indenture leased to J. S. for 200 years rendering rent at Michaelmas, and afterwards conveyed the reversion to the plaintiff, who for rent behind brought the action against the assignee of J. S. who confessed the lease, but said, that B. covenanted for him, his heirs and assigns, with J. S. his executors and assigns, that if he be disturbed for respite of homage, or be forced to pay any charge, or issues lost, that he should retain so much of his rent, as he should be enforced to pay; and, that by force of a writ issuing out of the Exchequer for respite of homage and issues lost, so much was levied by the sheriff, which he hath retained of his said rent. Resolved, that the assignee shall have benefit of the covenant, both by the common law and by the Statute 32 H. 8. for that it was a covenant which did run with the land; and at the common law he might have taken advantage to retain the rent reserved upon the lease, for it may be appointed to cease at the will of the parties. Cro. C. 137. pl. 11. Mich. 4 Car. B. R. Bayly v. Hughes.

Jo. 249, pl. 7 Pasch. 7 Car. S. P. and seems to be S. C. though somewhat differently stated, and the Court held that if the charge was lawful, then the defendant might retain his rent, and he might well plead it in bar of the action, but it appearing that the charge for

respice of homage was not good, and the covenant did not extend in law but to a legal charge, therefore judgment was given for the defendant; but says, that Crooke said nothing, but seemed to be contra.

24. A. leased land to J. S. for 21 years reserving a rent, and likewise a gross sum by way of fine payable after the death of W. R. proviso that for default of payment A. might re enter. A. levied a fine and assigned the reversion to B. adjudged, that this case is not within the Statute 32 H. 8. and the condition of entry not transferred over by transferring over the reversion; for a man cannot by his own act divide a condition which goes in destruction of an estate. Sty. 316, 317. Hill. 1651. B. R. Deking v. Latham.

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25. As assignee of lessee shall be charged in covenant for repairs (though the assignees are not named in the covenant) in respect of his having the possession according to 5 Rep. Spencer's Case, so the assignee of the reversion shall have action of covenant for default of repairs in respect of his having the reversion, though assignees are not named in the covenant; arg. to which all the Court agreed. Lev. 109. Mich. 14 Car. 2. B. R. in Case of Kitchen v. Buckley.

Sid. 157. pl. 8. Kitchen v. Compton. S. C. adjudged.

26. Covenant

s Show.
133. pl. 113.
S. C. adjor-
natus.

26. *Covenant by B. an assignee of a reversion against M. and N. two lessees*, upon a lease for years, rendering 70*l.* per ann. rent, which they for themselves, and for their executors, administrators and assigns, covenanted to pay to the lessor, his heirs or assigns, according to the reservation; and for rent arrear, and incurred after the assignment, B. brings covenant. M. Nil dicit N. the other defendant pleaded in bar, that before the assignment to the plaintiff he by the consent of the lessor, released to M. and that the lessor accepted him as his sole tenant, and that he paid the rent to him, which the lessor accepted as of his tenant; and upon demurrer it was objected, that the covenant ensuing the rent, a discharge of the rent is a discharge of the covenant. But on the other side was cited the Case of Brett and Cumberland, that no act of the lessee can discharge himself, or his executors of a special covenant, of which also the assignee of the reversion shall have benefit by the Statute 32 H. 8. and judgment for the plaintiff accordingly. 2 Jo. 144. Pasch. 33 Car. 2. B. R. Ashurst v. Mingy.

(K. 2) Who shall take Advantage of a Covenant. Persons coming in by Act in Law, or not named.

1. *EXECUTORS shall have a writ of covenant of a covenant made unto their testators for a personal thing.* And it appears by the register he may sue a plaint of covenant in the county, or in the hundred-court &c. and that he shall have a recordare to the sheriff for to remove the same out of the county into C. B. as it shall be done in a replevin sued there; and if the plaint of covenant be sued in the hundred, or in other court of other lord, he shall have an accedas ad curiam directed unto the sheriff to remove the plaint into C. B. F. N. B. (D).

2. If a man demise or grant to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the feme takes husband and dies, the baron shall have an action of covenant as well upon the covenant in law upon these words, demise or grant, as upon the express covenant. 5 Rep. 17. a. per Cur. Pasch. 25 Eliz. B. R. in the 5th Resolution in Spencer's Case.

3. So it is of a tenant by statute merchant, or statute staple, or elegit of a term, and he to whom a lease for years is sold by force of an execution, shall have an action of covenant in such case, as a thing annexed to the land, although that they come to the term by act in law. 5 Rep. 17. a. per Cur. Pasch. 25 Eliz. B. R. in the 5th Resolution in Spencer's Case.

4. As if a man grant to a lessee for years that he shall have so much flowers as will serve to repair his house, or that he shall burn within his house, this is appurtenant to, and shall run with the

the land into whose hand soever that the lands shall come. 5 Rep. 17. a. b. per Cur. *obiter. Pasch. 25 Eliz. B. R. in the 5th Resolution in Spencer's Case.

5. Lessee covenanted with the lessor, his executors and administrators, *to repair, and leave in repair*, at the end of the term. In covenant brought by the heir it was objected, that it lay not for him; but it was answered, that it is a *covenant running with the land*, and shall go to the heir though not named. Besides, it appears that the *intent was, that it should continue after the death of the lessor*, it being with him, his executors and administrators, and therefore shall not determine by his death, upon which judgment was given in the Exchequer for the plaintiff. 2 Lev. 92. Mich. 25 Car. 2. B. R. Lougher v. Williams.

† 2 Lev. 92. same reason for continuance of rent; Sacheverel v. Frogg.

6. *Cestui que use of a rent-charge* executed by the statute cannot bring action upon a *collateral covenant*, for that remains with the feoffee &c. though *cestui que use* may distrain as incident to the estate to be executed in him. 2 Mod. 138. Mich. 28 Car. 2. C. B. Cooke v. Herle.

Mod. 223. pl. 12. Balcawen and Herle v. Cooke S. C. adjudged.

7. But of covenants *running with the land* he may take advantage; Arg. 3 le. 225. in the Case of Scott v. Scott says the Statute 32 H. 8. has been so expounded before.

8. A bishop granted a lease to J. S. who covenanted with the bishop and his successors, to repair and leave repaired at the end of the term; the bishop died, and the lease expired in his successor's time, and the repairs not done; the successor died, and the executor of the successor brought action of covenant, and adjudged that it lay for him. 2 Vent. 56. Trin. 1 W. & M. in C. B. Morley v. Polhill.

3 Salk. 109. pl. 10. S. P. as to the executors of the bishop by whom the lease was made, and ad-

judged the action well brought by them.

9. Lessor covenanted to renew the lease at the request of the lessee within the term. The lessee died within the term, having laid out a considerable sum of money in improving the premises, and the executors of lessee requested a new lease within the term. It was objected that the executors might be insolvent persons, and so the lessor in danger of losing his rent. Lord C. Macclesfield said, that the meaning of this covenant was, that the lessee might be reimbursed what he had laid out in improvements, and therefore immaterial whether the lessee or his executors require the renewal; and that there is to be a clause of re-entry in the lease, and the value of the premises being doubled by the improvements of the original lessee, such clause will secure the landlord against any insolvency of the tenant, and therefore ordered defendant, the lessor, to pay costs in this Court, and at law for an ejectment brought against the plaintiff, and in which he had recovered judgment. 2 Wms's, Rep. 196. Mich. 1723. Hyde v. Skinner.

(K. 3) Who shall take Advantage of a Covenant,
and against whom.

By Statute 32 H. 8. cap. 34.

Resolutions
and judg-
ment upon
the Statute
32 H. 8.
cap. 34.

1. That
the said Sta-
tute is gene-
ral, viz. that
the grantees
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of the rever-
sion of every
common per-
son as well
as of the
king shall
take advan-
tage of con-
ditions.

a. The
Statute ex-
tends to
grants made
by the succe-
ssors of the
king, though
the king be
only named
to the act.

3. Where
the statute
speaks of
lessees, that the same does not extend to gifts in tail.

4. Where the statute speaks of grantees and assignees of the reversion an assignee of part of the state of reversion may take advantage of the condition. As if lessee for life be &c. and the reversion is granted for life &c. So if lessee for years &c. be, and the reversion is granted for years, the grantee for years shall take benefit of the condition in respect of the word (executors) in the act.

5. A grantee of part of the reversion shall not take advantage of the condition. As if the lease be of three acres reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right.

6. In the King's Case, the condition in that case is not destroyed, but remains still in the king.

7. By act in law a condition may be apportioned in the case of a common person; as if a lease for years be made of two acres, one of the nature of Borough English, the other at the common law, and the lessor having issue two sons, dies; each of them shall enter for the condition broken, and a condition may be apportioned by the act and wrong of the lessee.

8. If a lease for life be made reserving a rent upon condition &c. and the lessor levies a fine of the reversion, he is grantee or assignee of the reversion, but without attornment he shall not take advantage of the condition; for the makers of the statute intended to have all necessary incidents observed, otherwise it might be mischievous to the lessee.

9. There is a diversity between a condition that is compulsory, and a power of revocation that is voluntary; for a man that has power of revocation, may by his own act extinguish his power of revocation in part, as by levying of a fine of part, and yet the power shall remain for the residue. Because it is in nature of a limitation, and not of a condition; and so it was resolved in the EARL OF SHREWSBURY'S CASE. Dyer 99.

10. If the lessor bargains and sells the reversion by deed indented and inrolled, the bargainee is not en le per by the bargainor, and yet he is an assignee within the statute. So if the lessor grants the reversion in fee to the use of A and his heirs. A. is a sufficient assignee within the statute; because he comes in by the act and limitation of the party, albeit he is in the post, and the words of the statute be to or by, and they are assignees to him, though they are not by him. But such as come in merely by an act in law, as the lord of the villein, the lord by escheat, the lord that enters or claims for mortmain or the like, shall not take benefit of this statute.

11. If the lessor, in the case before, bargains and sells the reversion by deed indented and inrolled, or if the lessor makes a feoffment in fee, and the lessee re-enters, the grantee or feoffee shall not take any advantage of any condition without making notice to the lessee.

12. Albeit the whole words of the statute be, for non-payment of rent, or for doing of waste, or other forfeiture, yet the grantees or assignees shall not take benefit of every forfeiture by force of a condition, but only of such conditions as either are incident to the reversion, as rent, or for the benefit of the state, as for not doing of waste, for keeping the houses in reparations, for making of fences, scowering of ditches, for preserving of woods, or such like, and not for the payment of any sum in gross, delivery of corn, wood, or the like, so as (other forfeiture) shall be taken as other forfeitures, like to those examples which were there put, viz. of payment of rent, and not doing of waste, which are for the benefit of the reversion. Co. Litt. 215. a. b.

This act extends not to grants of estates in fee or in tail, but only to leases for life or years. Cro. E. 863. pl. 40. Mich. 4s & 43 Eliz. C. B. Lewis v. Ridge. ——— Extends not to a naming *pana*. Co. Litt. 16a. b.

2. If lessee for years of 20 acres grants his interest of 10 acres, this was apportionment at common law, and the lessor shall have several avowries and several actions of debt; for in this case no mesnalty was created as was at common law, but very lord and very tenant, and for this mischief the statute was made; for if the tenant before the statute had made a feoffment of divers parcels, to hold by an halfpenny or such little thing, then the lord should know the ward but of this moiety &c. Per Plowden. Mo. 93. pl. 230. Pasch. 12 Eliz. Anon. [399]

3. A lease was made for 30 years, and lessor covenanted to repair the house, and to do other things. The lessee granted parcel of the term for ten years; it was holden that his grantee should not have an action of covenant, by the Statute of 32 H. 8. of Conditions, for he is not tenant to the first lessor; but if lessor grants his reversion for years, his grantee shall have covenant or benefit of condition with which the lessee is charged, for he is an assignee within the statute, because the lessee holds of him; per Plowden, Nichols, and Chambers, but Ipesley e contra strongly. Mo. 93. pl. 230. Pasch. 12 Eliz. Anon.

4. A lease of three manors, rendering for one 6l. for another 5l. for the third 10l. with condition of re-entry for non-payment, the lessor granted the reversion of one messuage, and the lessee attorned; after the lessor bargained and sold the reversion of all and the lessee attorned, and rent in one manor is behind. It seemed to several that the bargainee of the reversion is aided by the words (to or by the lessor &c.) for this is the intent of the law &c. and within Statute 32 H. 8. to take advantage of a condition; they all but Mounson, held that the assignee ought to be of the entire reversion, as it was in the lessor himself, and not of part of the reversion, nor the grant of it of less estate than was in the lessor himself at the time of the making the condition, and upon that adjudged not; Mo. 97, 98. pl. 241. Appowell v. Monoux S. P. held accordingly, and seems to be S. C. — The Court held that an assignee of part of a reversion may take advantage of the condition or

covenant, so not; and holden that the reversion within 32 H. 8. ought that he hath to be expectant upon a term or frank tenement, and not upon part of the reversion of the thing demised. Dy. 308. b. 309. a. pl. 75. Pasch. 14 Eliz. Winter's Case.

And Coke Ch. J. said, that the opinion of Mounson 14 Eliz. 309. a. was good law. Ow. 158. Mich. 8 Jac. in Case of Alfo v. Hemming. Godb. 162. in pl. 257. Warburton J. cited D. 209. Winter's Case, that he that brings action upon the statute, ought to have the whole reversion. But Coke Ch. J. and Foster said, that he need not; for it had been adjudged, that if the reversion be granted in tail, the grantee shall take advantage of this statute, and shall enter for the condition broken. — S. C. cited 2 Bull. 288. and Coke Ch. J. said, it is as common as may be, that an assignee of a reversion for part shall have benefit of a covenant, and that so it is in the Case of Hill v. Grange, in Pl. C.

5. If tenant for life be disseised and *reversioner confirms the estate of disseisor*, and the tenant for life re-enters, the disseisor is now an assignee, but otherwise it is, if *reversioner releases* to disseisor. Per Manwood. 4. Le. 29. in Case of Lee v. Arnold.

6. A. seised of copyhold lands, part Borough English and part at common law, by licence of the lord leases them on condition and dies within the term, leaving two sons; the youngest purchases the reversion of the lands at common law of the eldest, for the one part, as heir in Borough English, and of the other, as assignee of his elder brother, he shall take advantage of the condition. Mo. 113, 114. pl. 254. Pasch. 20 Eliz. Anon.

7. Assignee of an assignee shall have action of covenant; resolved. 5 Rep. 17. b. Pasch. 25 Eliz. B. R. the 7th Resolution in Spencer's Case.

8. So of the executors of the assignee of the assignee. Ibid.

9. So of the executors or administrators of every assignee; for all are comprized within the word (assignee), because the same right which was in the testator or intestate shall go to his executors or administrators. Ibid.

[400] 10. This act extends to covenants which concern the thing demised, but not to collateral covenants, cited as resolved. 5 Rep. 18. a. Pasch. 25 Eliz. B. R. in Spencer's Case.

Covenant in a lease by lessor to renew the term on payment of 10l. lies against the assignee of the reversion. And. 82. pl. 148. Pasch. 22 Eliz. Isted v. Stonely. — But a covenant by lessor to repair a bridge on land not in the lease, will not bind the grantee of the reversion; and if such covenant was by the lessee, the grantee of the reversion shall not take advantage of them. Arg. And. 82. — So a covenant by lessee of a house for three years to account and pay for every tun of wine sold in the house so much is collateral and goes not with the land, or the reversion by assignment of the three years. Godb. 120. pl. 140. Hill. 29 Eliz. B. R. Anon.

4 Le. 34. 11. A. seised of a manor leased the same for years rendering rent with clause of re-entry; A. levies a *fine sur consuefance de droit* to the use of himself and his heirs. The rent being demanded, is behind. The question was, whether the *consuef*or be an assignee within the Statute 32 H. 8. 34. Manwood thought that *being cesty que use, who is in by act in law*, he might *avow and re-enter* without attornment, for that he is in by

by the Statute 27 H. 8. *But that if the right had been in the conusee and he had died without heir, that the lord by escheat might avow*, though the conusee himself could not. Harper J. held, that the heir might avow and re-enter without attornment. Dyer J. held, that conusor cannot enter or avow before attornment, and is not assignee within the statute. 3 Le. 103, 104. pl. 152. Pasch. 26 Eliz. C. B. Anon.

12. He who is *in by a common recovery* is not an assignee, though the recovery was to his use, for the writ disaffirms his possession. Per Mounson J. 4 Le. 29. pl. 82. Mich. 27 Eliz. C. B. in Case of Lee v. Arnold.

13. He who hath a *reversion by limitation of an use or by a common recovery*, though he be in en le poist, yet he shall take advantage of the condition as an assignee within the 32 H. 8. But the lord that comes to a *villain's land*, or a lord by *escheat*, cannot take advantage of such condition; for they come to land by reason of their seignory, which is a *title paramount*. 3 Rep. 62. b. per Cur. Mich. 37 & 38 Eliz. C. B. in Lincoln College's Case.

The report is reflected upon by Serjeant Maynard, and said, that there was no such resolution. Mod. 192. but Ibid. 193. the

Court said, that the report in Lincoln College's Case, whether there was any resolution in the case or not, is founded on fo good reason, that conveyances since have gone according to it.

14. A lease for years was made to A. rendering rent, with a clause of re-entry for non-payment; the reversion was granted to C. who levied a fine thereof to B. who before any attornment granted the said reversion to C. his son and heir, to whom A. attorned; the rent was in arrear and C. entered; resolved, that the entry was lawful by virtue of the Statute 32 H. 8. of Conditions; for though the statute is general, viz. (other persons being grantees or assignees, shall have like advantages &c.) Grantee or assignee by fine shall not take advantage without attornment; for when a statute speaks of assigns, it shall be intended such complete assignees as have all the ceremonies and incidents requisite by law; yet here the son was a complete assignee within the statute, because there was an actual attornment made to him, and the words, viz. (as the grantors or lessors might) are not to be intended of the immediate grantor, but of any grantor, before he can take any benefit of the condition. 5 Rep. 111. b. Pasch. 43 Eliz. B. R. Mallory's Case.

Cro. E. 805. pl. 6. S. C. adjournatur. — Ibid. 832. pl. 1. S. C. the Court held accordingly and resolved to give judgment for the defendant, but other matter being moved it was adjourned.

15. Assignee not named is not bound by collateral covenants, [401] as to build a house de novo; but though not named he is bound by covenants that are for the benefit of the estate according to the nature of the soil, as to lay so many acres every year to pasture. Cro. J. 125. pl. 11 Trin. 4 Jac. B. R. Cockson v. Cock.

16. A. leased land to B. for 7 years, who covenanted to pay the rent to A. his heirs and assigns. Afterwards A. leased to C. for life, and demised the reversion to D. for 40 years if the so long lived; and B. attorned. The Court held, that D. the assignee

a Bult. 281. Attor v. Hemmings, S. C. but

states it, that A. devised the reversion to C. his wife for life, who granted it over to D. if C. shall so long live. B. attorned; and adjudged that D. may have covenant for the rent. Roll. Rep. 80. *ARTHUR v. HEMING*, S. C. states it as a grant to C. for life, and that B. attorned, and afterwards C. leased her reversion for 40 years, if she so long lived, to which B. attorned. Adjudged accordingly.

17. *Lease to husband and wife*; husband dies; the wife accepts the land; she shall not be charged with collateral covenants though she agrees to the estate, because they do not depend on the estate; arg. 2 Brownl. 136. Mich. 9 Jac. C. B. in *Case of Bagnall v. Tucker*.

Cro. J. 305. 18. *Copyhold land* is not within the 32 H. 8. For the assignee is not in by the copyholder, nor is privy to the lease made by him, but is in only by the custom, and may plead his estate immediately under the lord, per tot. Cur. on the first opening. Yelv. 222. Trin. 10 Jac. B. R. *Brasier v. Beale*.

ruled that he could not, neither by the common law, nor by the statute, and judgment accordingly for the defendant. — Brownl. 149. S. C. per tot. Cur. — Co. Comp. Cop. 87. f. 21. cites S. C. accordingly.

Godb. 162. 19. *Grantee for years of the reversion* shall take advantage of a condition within the Statute 33 H. 8. cited by Coke Ch. J. in pl. 227. Coke Ch. J. 2 Bulst. 282. Mich. 12 Jac. as adjudged in C. B. in *LEONARD'S CASE*, and said that it is very plain and clear that such grantee may have an action of covenant at the common law, and that the old difference was between a covenant personal and real.

as a Case in Ld Dyer's time that lessee for years leased over part of the term upon condition, (which is so much as a covenant) and afterwards granted the reversion, and it was ruled, that the grantee might enter for the condition broken, and the reason (as he said he remembered) was, because (executors) are named in the statute; but said, he would not charge his memory with the reason, but said, that he was well assured that the case was ruled at he had said. — And Ibid. in the principal case there, Pasch. 8 Jac. C. B. *BRISTOW v. BRISTOW*, S. F. was held by Coke and Foster accordingly, but Warburton J. doubted.

Jo. 223. 20. *A lessee for years covenants for himself, his executors and assigns, that he would not erect any building in the garden demised to the prejudice of the plaintiff's light &c.* The lessee assigned, and his assignee erected an house in the garden to the prejudice of the plaintiff's light &c. In covenant for this against the executor of the lessee, he pleaded that the lessee had assigned to J. S. who entered and paid his rent to the plaintiff, and that the plaintiff accepted him for his tenant &c. Upon demurrer &c. per Cur. the action lies, and that here being an express covenant, it shall bind him and his executors, and no assignment or acceptance of the rent from the assignee shall take from him the advantage of suing him or his executors upon express covenant, no more than if a lessee had obliged himself in an obligation to pay his rent, his assignment over of his term, and the acceptance of the rent by the lessor of the assignee shall not take from him the advantage of the obligation. Cro.

C. 188.

C. 188. pl. 8. Pasch. 6 Car. B. R. Bachelor v. Gage, Executor of Gage.

*21. The Earl of Lincoln makes a lease of lands in Lincolnshire at London, rendering rent, which the tenant covenants to pay; the Earl assigns the reversion to Thursby, who for non-payment of the rent brings an action at London. The defendant pleaded a surrender, and thereupon issue; resolved, that debt is maintainable only upon the privity of estate, and goes with the reversion at common law, and the assignee might have maintained it before the statute; but covenant did not go to the assignee before the statute, because it went only in privity of contract, and now, though by the statute, the covenant doth pass to the assignee, yet the nature of it is not altered by the statute, but it is assignable only as a contract, and therefore may be brought where the contract was made. 1 Lev. 259, 260. Hill. 20 & 21 Car. 2. B. R. Thursby v. Plant.

Sid. 401. pl. 8. S. C. and held that the action is well brought. — Vent. 10 Nutt v. Hall, S. C. adjourned. — 2 Keb. 539. pl. 93. and 448. pl. 16. and 468. pl. 55 S. C. adjournatur. But Ibid. 492. pl. 44. adjudged

for the plaintiff nisi. — Saund. 237. S. C. adjudged for the plaintiff. But upon error brought in the Exchequer Chamber the justices and barons were of diverse opinions prima facie, whereupon the matter was compounded, and so not determined in Cam. Scacc.

22. Condition that lessee shall not assign over to any but his kindred. Lessor assigns over the reversion, and lessee assigns over his term, and breaks the condition; quære, if this be a condition within 32 H. 8. 34. or a collateral condition? Atkins J. thought it a condition within the statute 32 H. 8. cap. 34. but others thought it a collateral condition, & adjournatur. Raym. 250. Hill. 30 & 31 Car. 2. C. B. Lucas v. How.

23. Devise of the reversion of a term for 1000 years to A. for life, and if he died within the term, then to his first son &c. A. may bring covenant; for the devise of the term to him passed the whole estate, and the remainder to the son was a possibility and an executory devise. 2 Vent. 128. Hill. 1 & 2 W. & M. in C. B. in Case of Dowse v. Cale, and cites 8 Rep. 96. Manning's Case, and 10 Rep. Lambet's Case.

3 Lev. 264. 265. Dowse v. Earle, S. C. accordingly.

24. At the common law an assignee of a reversion might have maintained an action of covenant for any thing agreed to be done upon the land itself; privity of contract is not thereby transferred so as to make the action transitory, but it must be brought upon the privity of estate; for if a man does covenant to do any collateral thing not in the demise, and the word assigns is in the deed, yet they are not bound if they have no estate, so that it is not the naming of them, but by reason of the estate in the land they are made chargeable; per Cur. 3 Mod. 388. Hill. 2 W. 3. B. R. in Case of Barker v. Damer.

25. A copyholder makes a lease; the lessee covenants to repair; the copyholder surrenders to the use of A. who is admitted; the lessee assigns his term. A. may bring covenant against the assignee for not repairing, for that he is within the 32 H. 8. cap. 34. as much as any thing can be within the equity of the

4 Moh 80. S. C. adjudged accordingly. — Skinn. 296. S. C. says, that

at first Holt Ch. J. in-
cluded accordingly. Mich. 3 W. & M. Glover v. Cope.
against the
plaintiff; sed adjournatur.—Ibid. 305. S. C. adjudged for the plaintiff.—Carth. 205. S. C.
adjudged after two solemn arguments for the plaintiff.—1 Salk. 185. pl. 2. S. C. adjudged ac-
cordingly.—Comb. 185, 186. adjudged accordingly.

[403] (L) *Who shall be bound by it without naming.*
The Assignee

5 Rep. 24. [1.] If a man leases for years, and the lessee covenants in this
a. b. the manner: *Proviso semper, & præd. f. the lessee doth co-*
Dean and venant, *that he will repair, maintain, and sustain the houses*
Chapter of upon the premises, *ad omnia tempora necessaria, during all the*
Windfor's Cafe, S. C. *said term*; and after the lessee assigns over the term, the assignee
adjudged shall be bound by this covenant to repair the houses during
Mich. 43 & the life of the first lessee, though the assignee be not named,
44 Eliz. because the covenant runs with the land, being made for the main-
B. R. per tenance of a thing in esse at the time of the lease made. P.
tot. Cur.—Cro. E. 38 El. B. R. between the Dean of Windfor and Hide ad-
(457.) pl. 1. judged in a Writ of Error upon a Judgment in Banco
Pasch. 38 thereof.]
Eliz. B. R. Hyde v. Windfor,
S. C. adjourned.—Ibid. 552. Pasch. 39 Eliz. B. R. the S. C. and judgment affirmed.—
Mo. 399. pl. 523. S. C. adjournatur, but afterwards adjudged with the first judgment.

S. P. by [2. But the assignee shall not be charged in a writ of cove-
Gawdy v.enant for any breach after the death of the first lessee, inasmuch as
Fenner J. it is personal to the lessee himself. P. 38 El. B. R. agreed
Cro. E. 457. between the Dean of Windfor and Hide.]
(his) pl. 1. in case of
Hyde v. the Dean &c. of Windfor, S. C.—S. P. by Gawdy J. accordingly, and Fenner J. in-
clined to it; But Popham and Clench e contra, and so it was afterwards adjudged. Mo. 399.
400. pl. 523. in S. C.

* S. C. &
S. P. cited
Arg. Lev.
109. Mich.
14 Car. 2.
B. R. and
the Court
agreed to it.
3. Resolved, that when a covenant extends to a thing in esse,
parcel of the demise, the thing to be done by force of the cove-
nant is quodam modo annexed and appurtenant to the thing demised,
and shall run with the land, and shall bind the assignee, though
that he be not bound by express words; but when the covenant
extends to a thing which had not essence at the time of the
demise made, this cannot be appurtenant or annexed to a
thing which had not essence; as if the lessee covenant to * re-
pair the houses &c. this is parcel of the contract, and extends
to the supportation of the thing demised, and shall bind the
assignee though that he be not expressly named; but in the
case above, the covenant concerns a thing which was not in
esse at the time of the demise made, but to be newly made
afterwards, and therefore it shall bind the lessee, his exe-
cutors, and administrators, and not the assignee. 5 Rep.
16. Pasch. 25 Eliz. B. R. the first Resolution in Spencer's
Case.

4. It was resolved, that if the lessee covenants for himself and his assigns, *to make a new wall upon parcel of the land demised*, there, inasmuch as this is to be done upon the land demised, it shall bind the assignee; for this being to be done upon the thing demised, the assignee is to take benefit of it, and therefore he shall be bound by express words. *But if the covenant be for him and his assigns, if the thing to be done be merely collateral to the land*, and does not touch the thing demised in any sort, there the assignee shall not be charged; as if the lessee covenant for him and his assigns *to build an house upon the land of the lessor, which is not part of the demise*, or to pay any collateral sum to the lessor, or to a stranger, this shall not bind the assignee, and here the assignee shall not be charged any more than any other stranger. 5 Rep. 16. b. the second Resolution in Spencer's Case.

S. P. resolved upon the Statute 34 H. 8. that the grantee of the reversion, or the grantor, might have an action of covenant against the assignee, for the acceptance of [404] the possession he had made himself subject to all

covenants concerning the land, and the building of a wall was a covenant inherent to the land with which the assignee should be charged, though there wanted the word assignee in the deed. Mo. 159. pl. 300. Hill. 26 Eliz. Anon.

5. If a man *demises sheep, or other stock of cattle, or any other personal goods*, for any time, and the lessee covenants for him and his assigns to deliver at the end of the time such cattle or goods as good as the things demised are, or such a price for them, and the lessee assigns over &c. this covenant shall not bind the assignee, because it is *but a personal contract*, and wants such a privity as that is between the lessor and lessee, and his assigns, upon account of the reversion. 5 Rep. 16. b. 17. a. the third Resolution in Spencer's Case.

6. But in case of a lease of goods personal there is not any privity, nor any reversion, but merely a chose en action in the personality, but cannot bind any but the covenantor, his executors and administrators; so it is if a man *demise for years a house and land, with a stock or sum of money, rendering rent*, and the lessee covenants for himself, his executors and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant, for though the rent reserved was increased in respect of the stock or sum, yet the rent does not issue out of the stock or sum, but out of the land only; and therefore as to the stock or sum, the covenant is personal, and shall bind the covenantor, his executors and administrators, but not his assignee; and it is not certain that the stock or sum will come to the hands of the assignee, because it may be wasted, or otherwise consumed or perished by the lessee, and consequently the law cannot determine at the time of the lease made that such covenant will bind the assignee. 5 Rep. 17. a. in the 3d Resolution in Spencer's Case.

7. If a lessee for years covenants to repair the houses during the term, this shall bind all others as a thing appurtenant, and which runneth with the land into whose hands soever the lands shall come, whether by act in law, or by the act of the party,

for all is one with regard to the lessor; and if the law should not be so, great prejudice would accrue to him; and it is but reason that they who take benefit of such covenant made by lessor with the lessee, shall be bound by such covenants made by lessee with the lessor. 5 Rep. 17. b. Pasch. 25 Eliz. B. R. the 6th Resolution in Spencer's Case.

Gouldsb.

129. pl. 250
and 186.

pl. 12. S. C.
& S. P.

agreed. — Cro. E. 383. pl. 3. S. C. Gawdy and Clench held, that the action lay, but Fenner e contra, absente Popham, adjournatur.

8. Assignee of lessee for years is chargeable with a *nomine pœnæ* incurred after the assignment, but not before. Mo. 357. pl. 4. 486. Trin. 36 Eliz. Thyn v. Cholmley.

9. If a lessee covenants to discharge the lessor *de omnibus oneribus ordinariis et extraordinariis*, and to repair the houses, an action lies against the assignee, in respect that the lessee has taken upon him the charges of the reparation, the annual rent was the less, which trenches to the benefit of the assignee, et qui sentit commodum, sentire debet et onus. 5 Rep. 24. b. Mich. 43 & 44 Eliz. B. R. Dean and Chapter of Windsor's Case.

10. Error; lessee for years covenanted to pay yearly during the term, to the churchwardens of S. 20s. and to repair the houses, and because the assignee did not pay the 20s. nor repair, covenant was brought against the assignee; resolved, the assignee is not to pay this 20s. because it is a collateral thing to the covenant; also it is not shewed for what time the sum was behind; and thereupon adjudged that the declaration was not good, and the damages being entire, a judgment in B. R. was reversed. Cro. J. 438. pl. 10. Mich. 15 Jac. in Cam. Scacc. Mayho v. Buckhurst.

11. In debt for rent an assignee is chargeable for the time he enjoys it, and is in possession; per Holt Ch. J. Show. 348. Pasch. 4 W. & M. Buck v. Bernard.

(L. 2) Extent of Covenant to discharge.

1. **BOND** to make appropriation discharged of incumbrances though a pension was charged upon it, yet held that the obligee was not to discharge it of that pension; Arg. 3 Le. 44. cites 3 H. 7. 4.

2. Covenant in a feoffment with warranty that it is discharged of all rents, this shall not extend to rent-services which are incident to the lands of common right; Arg. 3 Le. 44. in pl. 64. Mich. 15 Eliz.

3. Bond or covenant to make a feoffment of land discharged &c. does not oblige to discharge it of such things with which it is charged by the law; Arg. 3 Le. 44.

4. A bishop in 1635 leased lands, and covenanted to pay all taxes during the term. Adjudged that this covenant cannot bind the successor, unless such covenants had been usual in former leases; and though such covenants had been in former leases, yet it cannot bind to pay a new tax (as the tax for a royal aid made in 1665) made by parliament, but ought to be intended of such

Vent. 223.
S. C. but
S. P. not
determined;
but Hale
Ch. J. said,
it would be
hard to ex-

such as were then in use, viz. Synodals &c. And Hale cited a case to have been so adjudged before. 2 Lev. 68. Mich. 24 Car. 2. B. R. Davenant v. the Bishop of Sarum.

tend it to new taxes; and that they all knew how

late this way of taxes came in. — 3 Keb. 69. pl. 11. S. C. and successors is not bound but only by ancient charges.

5. A covenant to discharge from taxes extends to subsequent taxes of the same nature, not of a different nature. 1 Salk. 198. pl. 4. Hill. 9 W. 3. B. R. in Case of Brewster v. Kidgell.

(L. 3) To repair. Extent thereof.

1. COVENANT was to repair the houses, edifices, and buildings, with necessary reparations, and to keep the demised premises with paling and fencing, and at the end of the term would leave the houses, and other the premises, sufficiently repaired, maintained &c. Breach was assigned in not repairing &c. the pavement in the court, and in carrying away locks and keys of a cupboard; the breaking of the glass windows, carrying away a shelf, which was not shewn to be fixed &c. It was objected, that the pavement was out of the covenant; for it is neither building, paling, nor fencing; sed non allocatur; for it is within the intention of the covenant, and is quasi the building, and within the words of (leaving them sufficiently maintained, repaired &c.) And it was objected, that the assignment of the breach in glass being broken cannot be in glass which is but cracked, and it is not within the intention of the covenant that such petty things should be a breach thereof; sed non allocatur; and as to the shelves, though not shewn to be fixed, they shall be intended to be so, and it is said, that diversæ res affixæ asportatæ fuerunt, and so a former judgment was affirmed. Cro. J. 329, 330. pl. 8. Mich. 11 Jac. B. R. Pyott v. Lady St. John.

2 Brownl. 56. S. C. argued; sed adjournatur. — 2 Bullf. 102. S. C. and judgment in C. B. affirmed.

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2. Tenant in fee of a house and mill made a lease to L. for 31 years, and L. demised the mill to J. S. for 5 years; afterwards L. demised the house and mill to F. for 31 years. F. covenanted to repair during the aforesaid term of 31 years; J. S. refused to attorn. The question was, if F. was bound to repair the mill, the covenant being to repair during the term, and nothing in the mill passed during the 5 years for want of attornment; but resolved, that he was bound to repair; for Hale said, that though the lease did not commence in point of interest, yet it did in point of computation, and this covenant was to repair during the 31 years. Vent, 185. Hill. 23 & 24 Car. 2. B. R. Lewin v. Forth.

2 Keb. 848. pl. 94. S. C. but S. P. does not clearly appear. — Ibid. 879. pl. 53. S. C. but obscurely reported; but says, the Court held, that though till attornment the defendant has but

an interest and no reversion, yet the term begins by computation from the first day, and though there is no remedy for the rent till attornment but by covenant for enjoying the rent yet it was the defendant's fault that he did not take a covenant that the defendant should attorn; and judgment for the plaintiff.

3. Covenant in a lease to repair &c. *prædimissa* from the time of the lease to the determination thereof, and so well kept in repair, shall give up at the end of the term, not saying from time to time; afterwards the lessee builds a *multi-house*, and if the covenant shall extend to it was the question; and held that it should in this case; for it is a continuing covenant, and though the house *had no actual*, yet it had a *potential being* at the time of the lease; judgment nisi. Skin. 121. pl. 17 Trin. 35 Car. 2. B. R. Brown v. Blunden.

3 Lev. 264.
Dowse v.
Earle, S. C.

4. A. grants a building lease of 3 messuages to B. who covenants to pull them down, and build 3 others in their room, and to keep and leave the said 3 new built messuages, and all other the said premises, houses, and buildings to be erected, in good repair. B. builds 4 houses instead of 3; per 3 Justices, contra Rokeby. B. must leave all 4 in repair, because of the last words which they held made a distinct covenant. 2 Vent. 126. Hill. 1 & 2 W. & M. in C. B. Dowse v. Cale.

5. A covenant was to keep in good repair the house, out-houses, and stables; the permitting the racks in the stable to be in decay is a breach of covenant if they were fixed up for use, and lay not loose; admitted, 2 Vent. 214. Mich. 2 W. & M. in C. B. Anon.

(L. 4) Construction, and Extent of Covenants in general.

1. A Covenant in law shall not be extended to make a man to do more than he can do. Brownl. 22. 12 Jac. Rot. 538. Bragg v. Wiseman.

[407] 2. A covenant for *perfecting a conveyance by further assurance, and for quiet enjoyment* &c. when they follow an express grant, they are not to give any thing, but to assist further and support, being a wall or monument about it, and therefore cannot be intended to exceed that whereunto they are said to be but handmaids, and they are not to be taken as if they stood alone, without respect to the whole context, and intent of the deed; so clauses in company have other constructions than when they stand alone. Per Hobart Ch. J. Hob. 275. Mich. 13 Jac. in the E. of Clanrickard's Case.

3. Covenant ought to be construed according to the intention of the parties, as if one covenant to leave all the timber upon the ground at the expiration of the term, and after cut it down, it is a breach of covenant though he carry it not away; but if a stranger cut it down it is no breach of covenant. Skin. 40. Arg. pl. 8. Pasch. 34 Car. 2. B. R. Anon.

4. So if covenant be to deliver an horse, and the defendant poisons and then delivers him; covenant lies. Skin. 40. Arg. pl. 8. Pasch. 34 Car. 2. B. R. Anon.

5. Words

5. Words of covenant shall be construed *favourably to support an estate* as to create a lease, but words of covenant shall not be construed conditionally to defeat an estate. Per Justice Powell, at Lent Affizes in Devon. 1708.

(L. 5) Construction and Extent as to Repairs. And Pleadings.

1. **A.** Leased a house and land to B. B. covenanted to leave it in the same plight at the end of the term as they were at the commencement. At the time of the demise the land was sown, and the houses in good repair, and now in action of covenant the count was, that the house was ruinous and the land not sown, and it was held well, and that a man by special act [or covenant] may bind himself to a thing which the law does not bind him to, as where a house is burnt by sudden adventure, covenant lies though waste does not. Br. Covenant, pl. 4. cites 40 E. 3. 5.

2. If a man covenants to leave the land as he found it, and the wind tears up the trees by the roots, the covenant [as to this] is void. Br. Covenant, pl. 4. cites 40 E. 2. 5. Br. Waste, pl. 18. cites S. C.

3. If aliens come suddenly and burn a house, waste does not lie, but contra of covenant by special words; per Cand. Br. Covenant, pl. 4. cites 40 E. 3. 5. As where lessee covenants to leave the house, in

as good plight at the end of the term, as he found it. Br. Waste pl. 19. cites S. C.

4. If I have a farm with a stock of cattle and I covenant to render so many at the end of the term, there if they die by a sudden murrain, yet I must make them good at the end of the term, per Morrice quod Cand. concessit. Br. Covenant, pl. 4. cites 40 E. 3. 5.

5. If a man leases for years, and a stranger enters by title, the lessee shall not have covenant against the lessor himself; for he has not broken the covenant, and also there is no warranty; but per Needham he shall have covenant, for the lessee has no other remedy. Br. Garrantes, pl. 89. cites 32 H. 6. 32.

6. If a man leases a manor for years, and the lessee covenants to keep the houses of the manor in as good estate as he found them, during the term; the lessee does waste in the houses and in cutting of ashes, the lessor brings covenant before the end of the term for the ashes; for as to them it was impossible that the covenant should be performed for he cannot repair them, but otherwise it is of the houses. Per Cur. 5 Rep. 21. a. Pasch. 35 Eliz. B. R. in Sir Anthony Maine's Case, cites Tempore E. 1. tit. Covenant 29. and says that with this agrees F. N. B. 145. (I) and 12 E. 3. tit. Covenant 2. Mo. 313. Arg. S. P. cites Tempore [408] E. 1. Fitzh. Covenant. 29. — 7 Rep. 15. a. S. C. cited per Cur. — S. C. cited by Dodderidge J. Godb. 335.

pl. 429. — S. C. cited by Chamberlaine J. a Roll. Rep. 347. — Mo. 323. Arg. cites 12 E. 3. tit. Covenant, pl. 2. S. P. — 2 Roll. Rep. 335. Dodderidge J. cites 10 E. 3. tit. Covenant [but it seems

seems misprinted for 12 E. 3.] but says that covenant does not lie during that term, because he was to relinquish his farm, and this is not during the term, but that waste lies presently.

7. Lessee covenants to repair, *provided lessor finds him timber*. Lessee is not bound to repair without timber found by lessor. Per Anderson Ch. J. 2 And. 72. cites 5 Eliz.

8. *Structura & pavimenta* are *synonymous* and a covenant to repair, and leave in repair the structures, extends to the pavements. 2 Bulst. 103. Trin. 11 Jac. St. John v. Piott.

9. Tenant for life of a park made a lease thereof, with all profits of the deer for 5 years, and the lessee *covenanted to repair the park, and to leave it well repaired in the end of the term*; and in an action of covenant brought by the lessor, after the end of the term, the *breach assigned* was, *that the defendant did not repair, but at the end of the term fecit vastum, (viz.) in permittendo the park pales to be in decay &c.* it was objected, that this breach was not well assigned; because there was an instant of time in which it could not be properly said, that fecit vastum; sed per Curiam, though a thing cannot be done in an instant of time, the waste cannot [may] happen permittendo in fine termini, so note the difference between doing a thing, and permitting a thing to be done, 2 Roll. Rep. 38. Trin. 16 Jac. B. R. Talbot v. Levifon.

Poph. 146.
Talbot v.
Lacen. S. C.
it was objected that
in fine
termini
was uncertain, because
it may extend after
the term,
but ad finem
termini had
been sufficient,
and cited old
book of
entries 169;
for when
he covenants that at the
end of the term he would
leave the premises in repair,
& ad finem termini,
he did waste, this must
necessarily be intended a
breach of the covenant,
and therefore it was
adjudged that the action
of covenant well lies.

10. Lessee covenants to repair the house to him demised, *during the term, or within three months after notice given, and to leave it so repaired*. Adjudged, that it is the election of the lessor either to give notice, or if the lessee does not repair the house during the term to bring covenant, and that they were *several covenants*, and if the lessee comes without licence after the term to repair the house, he is a trespasser, the first covenant being absolute, the second conditional, and the one does not take away the effect of the other. 2 Roll. R. 250. Mich. 20 Jac. B. R. Anon.

11. Lessor covenants to repair, lessee covenants that *ab & post emendationem & reparationem dicti mesuagii by the lessor* his heirs and assigns, he at his proper costs and charges *bene & sufficienter repararet & sustineret*. Held that though the mesuage was in good repair at the first, yet if afterwards it decay, the lessor is first to repair it before the lessee is bound thereto. Cro. J. 645, pl. 7. Mich. 20 Jac. B. R. Slater v. Stone.

This house consisted of several houses and outhouses, now this covenant of the lessor shall not be construed, to extend only to such buildings as wanted repair. Ibid. ——— Adjudged that covenant does not lie, for though it was in good repair and lessee pulled them down, yet it is not within the reach of the covenant, if the lessor does not first repair, but the true remedy was by action of waste. 2 Roll. Rep. 248. S. C.

12. In covenant the plaintiff declared on a covenant to *repair all the pales in a garden demised (except the pales on the west-side) and assigned the breach in not repairing the pales contra formam conventionis &c. but did not shew that the defect was of repairing the pales not excepted*; the defendant pleaded, that he had repaired the pales *secundum conventionem &c.* After verdict for the plaintiff it was moved in arrest, that the breach was not well assigned; for the defect might be in the pales excepted; sed non allocatur; for it shall be *intended after a verdict*, that the jury gave damages, for that the defect was in the pales to be repaired by the covenant, and the rather, because the issue was upon the repair *secundum conventionem*, which does not extend to the pales excepted. But agreed that if the defendant had demurred, judgment ought to have been for him. 2 Jo. 125. Hill. 31 & 32 Car. 2. B. R. Anon.

(L. 6) Constructions. Exclusive of Legal Incidents or Advantages.

1. LESSEE for life covenants sufficiently to *repair the houses at his own costs* during the term; he is not *stopped* by this covenant, or excluded by it of the benefit, given him by the law, of cutting timber for the repairs. Mo. 23. pl. 80. Pasch. 3 Eliz. Anon.

Dal. 28. pl. 3. S. C. in totidem verbis. — Mo. 7. in pl. 23. Pasch. 3 E.

6. Anon. S. P. by Montague, Brown and Fitzherbert.

2. If lessor covenants that *lessee may cut trees in other lands not leased*, yet lessee may cut the trees growing upon the land in lease. Mo. 23. pl. 80. Pasch. 3 Eliz. Anon.

Dal. 28. pl. 3. S. C. in totidem verbis. — So of esto-

vers. Mo. 7. Pasch. 8 E. 6. Anon. S. P. by three justices.

(L. 7) Breach of Performance what. And by whom.

1. IF a man makes a *feoffment of land by deed with warranty*, and a *stranger extends a recognizance* of the feoffer's upon the feoffee, covenant lies here. 17 Ed. 3. 18. a.

2. If a *parson makes a lease for years*, and afterwards *resigns*, it is a breach of covenant. Hob. 35. cites 12 H. 4. 3.

3. Where a man is bound to *make sure estate by such a day of land, called H. to the annual value of 10 l.* and he makes estate by the day of lands called H. to the *yearly value of 8 l.* he has not performed his covenant. Quære. Br. Conditions, pl. 9. cites 27 H. 8. 29.

4. If *lord of a manor, in which are freeholders and copyholders, is seised of a chalk-pit, and leases it with a covenant that neither he nor any of his tenants or under-tenants should dig gravel, other* So if A. is tenant to B. who holds of C. In this than

case *A. is under-tenant to C. and A. digs; this is a breach,* *then for repairs; if lessee of a copyholder digs, the covenant is broke; per Hyde. Keb. 775. in pl. 11. Mich. 16 Jac. B. R. in Case of Bourman v. A&on.*

for though he is not the immediate tenant to C. yet he is so mediately, and judgment accordingly. Lev. 144. Burman v. Aston, S. C. — Keb. 806. pl. 76. S. C. and per Cur. under-tenant is any that comes in under the lord's interest, and cited the Case of * BROMFIELD v. WILLIAMSON, [410] where the covenant was that lessee and his assigns, would pay the rent, and adjudged that the tenant at will or his assignee is within the meaning thereof; and so per Hyde if lease for 99 years be of copyhold, which has common in the waste, and lessee covenants that he nor his assigns shall not use the waste with cattle, in this case if his under-assignee of part puts in cattle it is a breach, and judgment accordingly.

* Sty. 409, 408. Hill. 1654. B. R. adjudged nisi.

Freem. Rep. 20, 21. pl. 24. S. C. resolved accordingly, and that the covenant if he will not revoke &c. extends only to the grant of the scribe's place. And Vaughan Ch. J. said, that it is no more than if a justice of peace grants to one to be his clerk, and covenants not to revoke or annul the said grant, yet if he be afterwards put out of commission he hath not broke the covenant. For it is but while he is justice of peace; and so of a bailiff of a manor, or keeper of a park, the owner may dispart.

5. The testator of G. was register to the Archdeacon of Suffolk, and grants the office of his scribe to the plaintiff, and covenants that he shall enjoy it as long as he or any other person had or did claim the place of register under him, and that he would not revoke, annul, or evacuate the said grant; afterwards he surrenders the place to the archdeacon, and the plaintiff being disturbed brings covenant; resolved that it would not lie, because that having surrendered his place, the archdeacon did not claim under him, but his estate was absolutely drowned; and the covenant was but for as long as he or any body claiming under him had the office of register. Freem. Rep. pl. 19. Mich. 1671. in C. B. Steping v. Gladding.

6. Lessee covenanted with the lessor, that lessor shall cut 20 of the best trees growing on the land at any time during the term; but before the lessor cut the trees the lessee cut 5 trees for bonfire. The Court held that this is a breach of covenant, by destroying the election of the lessor, and it was the lessee's own fault to make such a bargain. Freem. Rep. 397. pl. 516. Trin. 1675. Moterton v. Jollin.

Keb. 389. pl. 82. Barnard v. Rec S. C. & 6. P. agreed. — Freem. Rep. 379. pl. 494. Ren v. Barnes. S. C. & S. P. per tot. Cur. Burnis.

7. Debt was brought on a covenant in a charter party to pay the plaintiff 3l. a ton for goods imported; the breach assigned was in not paying for so many tons, and one hoghead, which amounts to so much. The declaration and breach in assigning the non payment for the hoghead is ill; for the covenant is only to pay so much per ton, but otherwise it would be if it had been to pay *secundum ratum* of so much per ton. 2 Lev. 124. Hill, 26 & 27 Car. 2, B. R. Rea v. Burnis.

— See tit. Apportionment. (A) per tot.

8. 30,000l. is covenanted to be laid out in land, the money need not be laid out all together upon one purchase, but if laid out at several times it is sufficient. Per Lord Talbot. 3 Wms's.

2 Wm's. Rep: 228. Mich. 1733. Lechmere v. Earl of Car-
lisle.

(L. 8) Actions. When the Action shall be
brought. .

1. A Man made a lease for years, and the lessee covenanted to
make reparations; the lessor granted the reversion to
another, and the lessee for years made his wife his executrix,
and died; it was holden in this case by the Court, that the
grantee of the reversion should not recover damages, but from the
time of the grant, and not for any time before; but yet
the wife, the executrix, should be charged for the not repairing as
well in the time of her husband as in her own time; and if she do
make the reparation, depending the suit, yet thereby the suit
shall not abate, but it shall be a good cause to qualify the da-
mages according to that which may be supposed, that the
party is damnified for the not repairing from the time of the
purchase of the reversion, unto the time of the bringing the
action. 3 Le. 51 pl. 72. Trin 15 Eliz. C. B. Anon. [411]

2. Covenant to suffer a recovery within a year. All the terms
are past and no recovery suffered, yet no action lies on that
covenant before the year be fully expired though all the terms are
past, and that it is impossible to do it within the time prefixed.
Per Popham Arg. 4 Le. 170.

3. Lessee covenanted to leave the houses, trees, and woods at
the end of the term in as good plight as he found them. Lessee
cuts down a tree, the covenant is broke, and the lessor shall
not stay till the end of his term to bring his action of cove-
nant, because it is apparent that the tree cannot grow again.
and be in as good plight as it was when he took the lease.
Per Doderidge J. Godb. 335. Trin. 21 Jac. B. R. in Case of
Waterer v. Mountague, cites E. 1. Covenant, 29.

Arg. Mo.
313. S. C.
cited. —
S. P. accord-
ingly as to
the trees;
but if he
pulls down
the houses,
the lessor
shall not
have action

of covenant before the end of the term. F. N. B. 145. (I) cites E. 1. Covenant, 29.

4. I oblige myself to pay so much money at such a day and so
much at another day; the Court held clearly that action of debt
lies if both days are not passed. Hardr. 178. pl. 4. Hill. 12 &
13 Car. 2. in Scacc. Norrice's Case.

3 Lev. 384.
ad finem,
cites S. C.
but by the
name of
Nowell's

Case, that covenant lies at the first day, but that there is a quære there as to debt.

5. Debt against the assignee after the lessor has several times re-
fused to accept him for his tenant. 2 Saund. 181. Mich. 22
Car. 2. Devereux v. Barlow.

6. Covenant was brought against the defendant as assignee
of one J. V. and the breach assigned was, that neither the
said J. V. in his life-time, nor the defendant since his death,
had kept the fences &c. in repair. After verdict for the
plaintiff judgment was arrested because the action does not
lie

lie against the defendant as assignee for a breach in the life-time of the assignor, and this breach being assigned for a default of reparation of the fence, as well in the life-time of the assignor, as in the time of the defendant since his death, and entire damages given, the plaintiff cannot have judgment. *Lutw.* 360. 363. *Trin.* 12 W. 3. *Britton v. Vaux.*

Fol. 522.

(M) *In what Cases it lies against an Assignee.*

Cro. C. 221, 222. pl. 8. *Congham v. King, S. C.* exception was taken, that the defendant being assignee of parcel

[1.] *F. A. demises to B. several parcels of land, and the lessee covenants for him and his assigns to repair &c. and after the lessee assigns to D. all his estate, in parcel of the land demised, and after D. does not repair that to him assigned, the lessor may have an action of covenant against D. the assignee. Tr. 7 Car. B. R. between Conham and King adjudged per Curiam, this being moved in Arrest of Judgment.]*

only of the thing demised, he is not chargeable with this covenant any more than the assignee of parcel shall be charged in debt for the rent; sed non allocatur; for this covenant is dividable, and follows the land with which the defendant as assignee is chargeable by common law, or by the Stat. 32 H. 8. and judgment for the plaintiff. — *Jo.* 245. pl. 3. *Conan v. Kemise, S. C.* adjudged.

2. If a man leases for years, and the lessee covenants to make reparations and other covenants, and assigns his term over, the assignee shall be bound to those covenants; for they run with the land. *Br. Deputy*, pl. 16. cites 25 H. 8.

3. *J. S. lessee covenanted to repair, and afterwards assigned his term to W. R. whom the lessor accepted for his tenant, and recovered the rent of him. W. R. suffered the house to be burnt down. Though by acceptance of the rent of W. R. after the assignment to him, the lessor is barred of his action of debt for rent against J. S. yet adjudged upon demurrer that covenant well lies against him. Brownl. 20, 21. Hill. 8 Jac. Fisher v. Ameers.*

S. C. cited *Carth.* 278.

4. Covenant by grantee of the reversion lies against the lessee after assignment of the term, though no notice nor acceptance of the rent had been pleaded, where there is an express covenant for payment of the rent; per *Cur.* 3 Lev. 233. *Trin.* 1 Jac. 2. *C. B. Edwards v. Morgan.*

5. Covenant will not lie against one merely as assignee of the land. 1 Salk. 198. pl. 4. Hill. 9 W. 3. *B. R.* in Case of *Brewster v. Kidgel*, cites *Hard.* 87. pl. 5.

6. Lessee covenants to rebuild and finish a house within such a time; the time expires; the house not rebuilt. Lessee assigns. Per *Holt Ch. J.* The assignee is not liable for breach before assignment; but if the lessee had assigned before the term expired, the assignee would be bound. 1 Salk. 199. *Pasch.* 12 W. 3. *B. R. Grescot v. Green.*

(N) In

(N) In what Cases it ought to be brought against the Assignee; and in what Cases against the Assignor.

[1.] If a man leases for years, rendering rent, and the lessee covenants for him and his assigns to repair the house during the term, and after the lessee assigns over the term, and the lessor accepts the rent from the assignee, and after the covenant is broke, notwithstanding the acceptance of the rent from the assignee, yet an action of covenant lies against the first lessee, for the lessee hath covenanted expressly for him and his assigns, and this personal covenant cannot be transferred by the acceptance of the rent. M. 16 Ja. B. R. between * *Ventrice and Goodcheap* adjudged; and the same term between † *Bernard and Godskall* adjudged. H. 16 Ja. B. R. between Sir J. † *Brett and Cumberland* adjudged upon demurrer. P. 16 Car. B. R. between *Norton* || and *Ackland* adjudged upon demurrer. Intratur H. 15 Car. Rot. 549. Tr. 6 Car. B. R. between the *Countess of Devon and Collier* adjudged where the breach was for non-payment of rent. P. 20 Car. B. between *Crofts and Tailor* adjudged upon demurrer, where the breach was for non-payment of rent. Intratur Hill. 19 Car. Rot. [Barnard.]

* S. C. cited by the name of *VARNIS v. GOODCHEAPE*. Cro. J. 309. pl. 8. as adjudged for the plaintiff on demurrer.
† Cro. J. 309. pl. 8. S. C. adjudged.
|| Cro. J. 521. pl. 7. S. C. says, that this point depended long in question, and after much argument

ment was at length resolved, that he was chargeable with the breach of this covenant, and that the assignee of the reversion should have the action, by the Statute 32 H. 8. [413] for it is a covenant in fait, and by the express words runs along with the land; and notwithstanding the assignment, the covenantor and his executors are always chargeable. So that neither by the assignment over of his estate, nor by any act he can do, can he discharge himself or his executors, who are chargeable by the act of their testator, having assets as long as the lessor continues the reversion in him; for the executors are not chargeable by reason of the privity of contract, but by reason of the covenant itself, and by the express words of the Statute of 32 H. 8. Such remedy as the lessor might have had against the lessee or his executors, such remedy the assignee shall have against them, it being a covenant in fait, which runs with the land; but otherwise it is of a covenant in law, which is only created by the law, or of a rent, which is created by reason of the contract, and is by reason of the profits of the land, wherein none is longer charged with them than the privity of the estate continues with them, and this covenant may charge the assignee who has the estate, and the lessee and his executors who made the covenant, all at one and the self same time, but execution shall only be against one of them; for if he sue an action against the one, and after against the other, as he well may do, if he take several executions, he who is last taken in execution shall have an audita querela; wherefore it was adjudged for the plaintiff. — Roll. Rep. 359. pl. 11. S. C. and it was held by Coke, Dunderidge, and Haughton, that the assignee should have advantage of this covenant at the common law, because it is a covenant for reparation of the thing leased. — a Roll. Rep. 63, 64. S. C. adjudged for the plaintiff. — Popht: 136, 137. S. C. adjournatur. — Godb. 276. pl. 391. S. C. adjournatur. — S. C. cited Cro. C. 188. in pl. 8. — Ibid. 580. pl. 3. cites S. C. — S. C. cited per Cur. Saund. 240, 241. which see at pl. 3.

|| Cro. C. 580. pl. 3. S. C. adjudged that the action well lay.

[2. If a lessee covenants, that he and his assigns will repair the house demised, and the lessee grants over his term, and the assignee does not repair it, an action of covenant lies either against the assignee at common law, because this covenant runs with the land, or it lies against the lessee at the election of the lessor. 25 H. 8. Brook Covenant 32.]

See the notes on the Case of Brett v. Cumberland in pl. 1. supra.

* S. C. cited
Arg. Show.
198.

3. Q. Eliz. made a lease for years, rendering rent, and lessee covenanted to pay it. The queen died, and the reversion descended to K. James; after which the lessee assigned over his term. The assignee paid the rent to the king, and afterwards the king granted the reversion by his letters patents, and the patentee accepted the rent of the assignee, and after brought covenant against the executors of the first lessee; and adjudged maintainable. Saund. 240, 241. per Cur. cites Cro. J. 521, 522. 16 Jac. * Brett v. Cumberland, and says, that this must necessarily be by reason of the privity of contract transferred by force of the Statute 32 H. cap. 34. for there was no privity of estate between them; because the first lessee had assigned his term before the grant of the reversion to the patentee, which prove that by the statute the privity of contract is transferred.

4. If lessee for years assigns over his term, the lessor having notice thereof, and he accepts the rent from the assignee, he cannot demand the rent of the lessee afterwards, yet he may sue other covenants contained in the lease against him, as for reparations or the like; per Jerman J. Sty. 300. Mich. 1651. Whitway v. Pinfent.

5. A diversity was observed between debt for rent and covenant for rent; for if the lessee assigns over, and after lessor accepts the assignee for his tenant, he cannot afterwards maintain the debt for rent against the first lessee, but he can maintain covenant against him; and one MIDDLEHAM'S CASE in 13 Car. 1. was cited by the Chief Justice, and it was also now agreed, that if lessee assigns his term, and after lessor assigns his reversion, and the assignee of the reversion accepts the rent of the assignee of the term, yet he may have covenant against the first lessee. Sid. 402. in pl. 8. Hill. 20 & 21 Car. 2. B. R.

6. Though upon an expresse covenant for payment of rent covenant lies against the lessee for rent arrear after his assignment; yet it seems that such action lies not against lessee on a covenant in law, as upon (yielding and paying) after assignment; nota. Sid. 447. pl. 9. Pasch. 22 Car. 2. B. R. Anon.

[414] 7. If a man covenants to pay rent, and after assigns, the lessor may upon this covenant charge the party, or his executors, or the assignee, at his election; and so it is if there be 20 assignments, for the party and his executors are always liable upon the deed to the covenant; dictum fuit. Freem. Rep. 337. pl. 417. Trin. 1673. in B. R. Anon.

8. If the assignee breaks the covenant he may be charged, or the lessee, or his executors; but if an assignee assigns over, and the second assignee breaks the covenant, the first assignee cannot be charged, but the second assignee that broke the covenant, or the lessee, or his executors may; per Hale Ch. J. Freem. Rep. 338. pl. 417. Trin. 1673. in B. R. Anon.

9. A lease is made for years to E. G. reserving rent. G. enters, and dies possessed; S. his executor, 4th June 1658, assigns to P. and P. the 4th June 1689, assigns to J. M. and for half a year's

1 Salk. 81.
pl. 2. Pinner v.
Tovey S. C.

a year's rent due on the 1st of January 1689; covenant was brought against P. The sole question was, if *notice of the assignment* should be given to the plaintiff, and adjudged maintainable by 3 Justices, contra Ventris. But this judgment was afterwards reversed in B. R. upon the matter in law, viz. that notice of the assignment to the plaintiff *was not necessary*; for by the assignment the privity of estate was gone, and there was nothing to support the action against the defendant, he being only assignee. 2 Vent. 234. Mich. 2 W. & M. in C. B. and 4 W. & M. in B. R. Tovey v. Pitcher.

and judgment in C. B. reversed in B. R. and the Court held, that there was no privity of estate or contract between the plaintiff and defendant,

and these failing the plaintiff's action must fail likewise, because that must be founded either upon the one or the other; and as to an objection that it might be assigned to a beggar; the Court answered, that it was the lessor's own fault and folly to take the first assignee for his tenant, and that the lessor was not without remedy; for that he might bring covenant against the lessee's executors, or he might disclaim on the land. — Show. 340. S. C. in B. R. and judgment in C. B. reversed. — 4 Mod. 71. S. C. in B. R. and that judgment in C. B. reversed. — Carth. 177. S. C. adjudged in C. B. but reversed in B. R. — 12 Mod. 23. S. C. and judgment in C. B. reversed, and nil dictum as to point of notice. — Comb. 192. Richards v. Turvey S. C. and by Holt Ch. J. assignment by assignee discharges him; because he was only chargeable as having the land; and there is no more reason for his giving notice to the lessor of his assignment over, than of the assignment to him by the lessee, and judgment in C. B. was reversed. — S. C. cited Lord Raym. Rep. 368. and Holt Ch. J. said, that that judgment of C. B. was reversed in B. R. by the opinion of the whole Court, which reversal was grounded upon the reason of Walker's Case, 3 Rep. 23 &c.

10. *Executor of a term assigns it over.* The assigner assigns it over to another. The executor still liable; but it seems that the executor's assignee is discharged on his assigning it over. 4 Mod. 76. Hill. 3 & 4 W. & M. in B. R. in Case of Pitcher v. Tovey.

(N. 2) Against whom. By Agreement to the Estate.

1. **A** Feoffment was made by deed with divers covenants. *One of the feoffees sealed the deed, but the other did not, but he occupied and survived.* Adjudged that he shall be bound by the covenants and seal of his companion. D. 13. b. pl. 66. cites 38 E. 3. to which Shelly agreed.

Roll. Rep. 359. Arg. cites S. C. but cites it as a lease to one for life, remainder to

another, and that lessee for life only sealed the counterpart, yet if he in remainder after the death of lessee for life agrees to the estate, he shall be subject to the covenants. — S. C. cited Arg. 3 Bull. 163. cites S. C. and Ibid. 164. cited by Coke Ch. J. — Co. Litt. 230. b. 231. a. S. P.

(N. 3) Lies against whom. Grantee. On Covenants by the Grantor, Feoffor, or Lessor.

LESSOR for years covenanted in the lease that at the end of the term he would make a new lease to the lessee or his assignees, and after granted over his reversion, and at the end of the term the lessor brought covenant against the grantee. Cited by Gawdy as a case which he remembered lately adjudged in C. B.

C. B. and to this all the Justices and Serjeants agreed. Mo. 159. in pl. 300. Hill. 26 Eliz.

(O) What will *extinguish* a Covenant.

There is no such point at 6 H. 4. 3. and this seems misprinted for 6 H. 4. 1.

a. pl. 5.

S. P. by Hankford, that the covenant is not extinct, but is a thing executory between them, and lies in privity by way of action, though the other has the house.

[1. IF a man covenants with tenant for life of an house to find a chaplain to sing &c. in the house every Saturday during the life of the covenantee, if the covenantee surrenders to the lessor the house, and re-takes an estate for years, yet the covenant remains. 6 H. 4. 3.]

[2. The same law if he had granted the house over, and he had not retaken an estate. 6 H. 4. 3. (Quære this, for after the grant, how is it lawful for the chaplain to come into the house without a trespass?)]

* See tit.

Reservation (N)

3. A covenant in law is abridged by an express covenant, though it be in the affirmative. D. 19. b. Marg. pl. 115. cites 4 Rep. 8. and 31 H. 8. 4. pl. 2. that * reservation to the lessor excludes the generality of the law, and that the heir shall not have the rent.

4. It was said by Manwood Ch. B. that by the recovery of the damages the lessee should be excused for ever after, for making of reparations; so as if he suffer the houses for want of reparations to decay, that no action shall thereupon after be brought for the same, but that the covenant is extinct. 3 Le. 51. pl. 72. Trin. 15 Eliz. C. B. Anon.

See tit.

Condition (N. c) pl. 2. and the notes there.

5. A collateral covenant in a lease to do a thing upon other land not leased is not gone by lessor's entry into the land leased. Mo. 402. pl. 534. Pasch. 37 Eliz. Carill v. Read.

6. If a man by deed doth covenant to build a house or make an estate, and before the covenant broken the covenantee releases to him all actions, suits and quarrels, this does not discharge the covenant itself, because at the time of the release nihil fuit debitum, there was no debt or duty, or cause of action in being; but in that case a release of all covenants is a good discharge of the covenant before it be broken. Co. Litt. 292. b.

7. If an estate be created, and a covenant in law annexed to it, the covenant shall cease if the estate ceases; but if an express covenant is annexed, and the covenantor does not perform it, action lies for not performing it, though the estate be avoided; agreed. Arg. 2 Brownl. 159. Pasch. 10 Jac. C. B.

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8. Where an estate is determinable and relative covenants are in the same deed, there when the estate determines the covenants are gone; but if estate pass, the covenants may be good enough; as where a charter of feoffment is made with a letter of attorney to make livery, and a covenant to quietly enjoy from thenceforth, if the party be disturbed before livery the covenant is broken; Arg.

Freem.

Freem. Rep. 175. in pl. 187. Mich. 1674. Done v. Dr. Barebone.

9. A. covenants with B. *to pay a rent to the use of C.* though the covenant (being collateral) is not transferred by the Statute of Uses with the remedies incident by law to the grant, yet the covenant is not discharged; and judgment accordingly. Mod. 223. pl. 12. Mich. 28 Car. 2. C. B. Boscowen v. Crooke.

a Mod. 138.
Cook v.
Herle, 8. C.
adjudged.

10. A covenant however good in its creation may be extinguished afterwards by the *death of the covenantor to whom the covenantee was heir*; agreed by all the judges of C. B. Comyns's Rep. 333. Mich. 6 Geo. 1. Madge v. Mudge.

11. A. covenants on his marriage to lay out 3000 l. in the purchase of land, and to settle it on A. in tail, remainder to B. A. purchases the manor of D. with this 3000 l. and never settles it, but suffers a recovery thereof; as the covenant was a lien on the land, so the recovery suffered of it, discharges the lien, and bars B. of the benefit of the covenant, and of the remainder. Resolved without difficulty. 3 Wms's. Rep. 171. Hill. 1732. in Case of Sir Sam. Marwood v. Turner.

12. If lessee covenants to repair he is bound to do it, though the house is burnt down. Comyns's Rep. 627. pl. 268. Hill. 12 Geo. 2. Chesterfield (Earl of) v. Bolton (Duke of).

(P) What an Extinguishment, though the Lease continues.

1. *By recovery of damages* in action of covenant for non-reparation, the lessee shall be excused for ever after from making reparations, so as if he suffer the houses for want of reparation to decay, no action shall hereupon be brought for the same, but the covenant is extinct; per Manwood. 3 Le. 51. in pl. 72. Trin. 15 Eliz. C. B.

2. The Prior of N. made a lease for life by indenture, by which lessee covenanted to find victuals for the cellarer at all times when the cellarer came thither to hold Court; the prior was dissolved, and the possessions given to the dean and chapter newly erected, it was held, that lessee should perform the covenant to him that supplied the office of cellarer, viz. the steward. 4 Le. 187. M. 17 & 18 Eliz. B. R. Anon.

3. A. leased a mill to B, and A. covenanted to find eight men to grind in the mill every day, and that if A. failed therein, B. should retain so much out of his rent. B. pulled down the corn mill and made it a horse mill. Per tot. Cur. By the alteration A. is discharged of his covenant and the conversion is waste, though for the lessor's advantage. Cro. J. 182. Trin. 5 Jac. B. R. City of London v. Grahme.

4. Debt on bond condition to perform covenants in a lease; defendant pleads, that after and before the original purchased, the lease was cancelled by consent of plaintiff and defendant.

Per Coke Ch. J. held clearly, the plea is not good without averment, that no covenant **was broke before* the cancelling the indenture. 2 Brownl. 167. Pasch. 10 Jac. C. B. Anon.

(Q) Continuing Covenant, though the Lease &c. is determined or surrendered.

1. IF a parson leases his glebe for years, and after resigns, by which the lease is void, yet action of covenant lies against him; quod nota. Br. Covenant. pl. 42. cites 12 H. 4. 5.

2. B. held certain land for term of 10 years of A. It is covenanted between A. and B. that if B. pay 100l. to A. within the said 10 years, that then he shall be seised to the use of B. in fee, and B. surrendered his term to A. and after paid him 100l. within the 10 years; there B. shall have fee; for the years are certain; contra where it is covenanted that if he pays 100l. within the term aforesaid, and he surrenders and pays the 100l. this is not good; for there the term is determined, but in the other case the 10 years remain notwithstanding the surrender. Br. Exposition pl. 44. cites 35 H. 8.

Cro. Eliz.
245. in pl. 2.
cites By-
low's Case
S. P. held
according-
ly.

3. By the Statute 13 Eliz. [cap. 20.] of leases it is enacted, that if a parson is non-resident on his living for the space of 80 days, all leases made by him, and all obligations and covenants &c. for enjoining it shall be void. It was adjudged that where a parson made a lease for years, in which were divers covenants on the lessee's part, and afterwards the lease became void for non-residency &c. that for a covenant broke before, an action of covenant did lie. Cro. E. 78. in pl. 37. Arg. cites 26 Eliz. Walls v. Cox.

Le. 179.
pl. 254.
Cheney v.
Langley.
S. C. here is
not any
warranty;
for the
plaintiff is
not lessee
but assignee to whom this warranty in law cannot extend; but admit that the warranty extends to the plaintiff, yet it determined with the estate of the tenant for life, and so the covenant ended with the estate.

4. In covenant the case was, tenant for life leased for years, and the lessee by indenture granted bargained and sold all his estate, to have &c. in tam amplis modo & forma as he ought to hold it; this implies no warranty, being the words of the lessee for years of a tenant for life, but determines with the estate on the death of tenant for life. Cro. E. 157. pl. 42. Mich. 31 & 32 Eliz. B. R. Landydale v. Cheney.

Le. 179. in
pl. 254. S. P.

5. If tenant in tail makes a lease for years and dies without issue, the covenant determines with the estate; Arg. And of that opinion was the Court. Cro. E. 157. in pl. 42. Mich. 31 & 32 Eliz. B. R.

Noy. 75.
S. C. the
Court
thought the
lessee dis-
charged of
the cove-

6. Lessee for years of a disseisor covenants to leave the &c. in good repair, and yield them up to the lessor. Lessor brings covenant and lessee pleads, that A. was seised in fee till by the plaintiff disseised, and afterwards A. re-entered who infeoffed J. S. who is yet seised &c. and upon demurrer adjudged

judged a good bar. Cro. E. 656. pl. 21. Hill. 41 Eliz. B. R. Andrews v. Needham. nant. For if the land be gone the obligation is discharged, and cites 20 H. 6. and 45 E. 3. &c.

7. A. leases to B. for 10 years, and covenants *at the end of the term to leave four acres of the land fallowed and plowed, and in the lease was a proviso that if B. mislike his bargain, that on a year's warning B. may surrender his estate; B. afterwards surrendered accordingly.* The acceptance of the surrender is no dispensation of the covenant, but otherwise if the proviso had been *in the end of 10 years; for then if the lessor accepts the surrender before the 10 years expires, it is impossible for the lessee to perform the covenant.* Noy. 118. Austin v. Moyle. [418]

8. An action was brought *upon an express covenant in a voidable lease*, adjudged that the action would lie though the lease was void, and Coke Ch. J. said, that if the action should not lie, a great mischief might happen; for a dean might as to-day make a lease to A. and keep it secret, and to-morrow make another to B. and covenant to enjoy, and so avoid the second lease. Brownl. 21. Trin. 9 Jac. Walter v. the Dean &c. of Norwich. 3 Brownl. 154. 158. S. C. adjudged. — Ow. 136. Waller v. the Dean &c. of Norwich S. C. and there a difference is

taken, when an estate is created in which is implied a covenant in law, there if the estate be void the covenant is void also; but when there is an express covenant in deed it is otherwise, though the estate be void or voidable. — An express covenant depending on the nature of the conveyance and which is only auxiliary, and goes along with the estate, is void, if the conveyance is void. Arg. Ch. Prec. 476. Mich. 1717. in Case of Furfaker v. Robinson.

9. If a covenant *depends on the interest of a lease, as a covenant to repair the thing demised, or to pay rent*, these covenants are void if the lease is void, because they immediately depend on the lease; but where the covenant is for a collateral thing, as a covenant that the lessor is owner at the time of the lease, or the lessee shall enjoy it, or shall be discharged and saved harmless, these covenants being collateral to the lease and interest are good though the lease is void; per Haughton Sergeant. Arg. Ow. 136. Pasch. 10 Jac. in Case of Waller v. Dean &c. of Norwich. See (A) pl. S. C. printed there by mistake.

10. A. possessed of a term for years *grants so much of the term as shall be unexpired at his death; the grantee assigns and covenants that the assignee shall enjoy against all persons*, and the plaintiff assigns a breach and issue upon it, and verdict for the plaintiff; it was moved in arrest of judgment that the action did not lie, because the original grant being void for the uncertainty, the covenants are void also, because the bond depends on the covenants and the covenants depend on the lease. But it was answered, that the term is not well assigned, but that here is a covenant that stands distinct by itself, and if there be not any covenant, then the obligation is single; adjudged for the defendant. Raym. 27. Mich. 13 Car. B. R. Capenhurst v. Capenhurst. Lev. 45. S. C. the covenant and obligation being both for the corroboration of a grant, which was void, they are also both void; and judgment (as the Reporter says, he heard) for the

the defendant. — Keb. 130. pl. 54. 164. pl. 118. 189. pl. 156. adjudged for the defendant. — S. C. cited 1 Salk. 199. Arg. Et hoc fuit concessum, per Holt Ch. J. because that was a relative and dependant covenant, and if there be no estate granted the covenant fails. — S. C. cited Ld. Raym. Rep. 388. But per Cur. the covenant in this case was that the covenantee should enjoy the term which was impossible, where no term passed by the deed.

Ld. Raym. Rep. 388. S. C. accordingly and so a judgment in C. B. was affirmed.

* Ow. 136. Waller v. Dean &c. of Norwich.

12. Where there is a *covenant and a bond* to perform it, and it refers to an estate and is to wait upon it, if there be no estate granted, as where there is a bargain and sale but not inrolled, the covenant fails. As where the deed was by the words grant, bargain, and sell &c. to the plaintiff, and the deed was not inrolled. But where a covenant is distinct, separate and * *independant*, it is not material whether any estate passed, and the plaintiff need not shew it, nor say quod defendens concessit. But the best way is to declare quod cum testatum existit &c. and judgment accordingly. 1 Salk. 199. pl. 5. Mich. 10 W. 3. B. R. Northcote v. Underhill.

[419] (R) Dispensed withall by becoming afterwards Unlawful.

A lease for years was made to a clergyman before 21 H. 8. who covenanted not to alien

without licence, and then the 21 H. 8. was made, which prohibited any clergyman to hold any land in farm, whereupon the clergyman *assigned without licence*, and the covenant was held not to be broken, because 21 H. 8. 13. made it unlawful for him to hold it. 12 Mod. 169. per Holt Ch. J. in delivering the opinion of the Court, Hill. 9. W. 3. cites D. 27. — Though the Statute *countervails a licence*, because every man is privy to it (which they would not agree) yet it was said that this statute *ought to be alledged*, it being erudition that where a statute licences a thing it ought to be pleaded by those that will take advantage of it. D. 27. b. pl. 178. Hill. 28 H. 8. Abbot of Westminster v. Leman.

Because the the act had given him only on ability to do it, the condition was not thereby dispensed with. Per Holt Ch. J. 12 Mod. 169. Hill. 9 W. 3. cites S. C. in

Case of Brewster v. Kidgell.

1. IF a *parson* has a term with condition *not to alien*, and then comes the *statute against keeping a farm*, yet it seems the condition is good. Arg. 2 Brownl. 142. in Case of Portington v. Rogers, cites [D. 28. b. pl. 189.] 28 H. 8. Leoman's Case.

2. A. had estate in the lands of B. and *before the Statute* 32 H. 8. *enabling tenant in tail to make leases for 21 years or three lives*; A. was bound in a recognizance to B. not to alien &c. but for the term of his own life. It was held by Bromley, Portman, and Harris Serjeants, that A. could not lease for 21 years without forfeiture notwithstanding the statute; but if he leased for 21 years or three lives, they thought that remainder-man could not avoid the lease after A's. death without issue, nor the donor neither, though in the statute were no words of the donor or remainder-man. D. 48. b. Pasch. 33 H. 8. pl. 5. E. of Bridgewater's Case.

3. Covenant upon a *charter-party for freight* was dated 10th of February, then comes an act of parliament, and says that all *French goods imported after the 9th of March following shall* be

be forfeited, and prohibited the importing; and this agreement was for the freight of the French goods, and this was pleaded in bar, to which the plaintiff demurred, and the Court inclined for the plaintiff, *not* being a thing that was *malum in se*; the Court seemed strongly for the plaintiff; *sed quære*. Skin. 161. pl. 9. Hill. 35 & 36 Car. 2. B. R. Dean v. Tracy.

4. Covenant *upon a charter-party* for the freight of a ship, the defendant *pleaded, that the ship was loaded with French goods, prohibited by law*, to be imported, and upon a demurrer the plaintiff had judgment; for the Court were all of opinion, that if the thing to be done was lawful at the time when the defendant entered into the covenant, though it was afterwards prohibited by act of parliament, yet the covenant is binding. 3 Mod. 39. Hill. 35 Car. 2. B. R. Bracon v. Deane.

See pl. 3. which seems to be S. C.

5. Where H. covenants *not to do* an act or thing which was lawful to do, and an *act of parliament* comes after and compels him to do it, the statute repeals the covenant. 1 Salk. 198. Hill. 9 W. 3. B. R.

12 Mod. 169. S. C. & S. P. by Holt Ch. J. in delivering the opinion of the Court. — Comb.

6. So if H. covenants *to do* a thing which is lawful, and an *act of parliament* comes in and *binds* him from doing it, the covenant is repealed. Ibid.

7. But if a man covenants *not to do* a thing which then was unlawful, and an *act* comes and makes it lawful to do it, such act of parliament does *not repeal the covenant*. Per Holt. 1 Salk. 198. pl. 4. Hill. 9 W. 3. B. R. Brewster v. Kitchell.

467. S. C. & S. P. by Holt Ch. J. [420]

8. But if a man covenants *to do* a thing which was *not lawful before*, and an *act makes it lawful*, that act does not repeal the covenant. 12 Mod. 169. Hill. 9 W. 3. per Holt Ch. J. in delivering his opinion of the Court in the Case of Brewster v. Kidgell.

(S) What is a Covenant; and what a Conditional Lease &c.

1. **L**EASE of a house for life by indenture, provided always, that if the lessee die within 60 years then next ensuing, that then his executors and assigns shall have and enjoy the land, as in right of the lessee, until the 60 years are expired; the Court thought that this was not a lease but only a covenant. Dy. 150. a. pl. 83. Trin. 3 & 4 P. & M. Parker v. Gravenor.

Ibid. Marg. cites Sparks's Case, fol. 8. pl. 45. and Bendl. cap. 68. [but I cannot find it] that the opinion of

the Court was that no lease for years was held by this proviso; because nothing of said term was given in fact to the lessee for his life, in his life as remainder to him and his executors for 60 years.

2. Lessee covenanted that it should be lawful for the lessor to cut the timber trees, and the lessor covenanted that it should be lawful for the lessee to take underwood, provided, and the lessee covenanted, that

that he would not cut timber trees. This proviso was adjudged a covenant and not a condition, because the intent appears to be only to abridge the generality of the covenant, precedent to which it is adjoined. Mo. 707. pl. 987. cited per Cur. as Pasch. 16 Eliz. Hannington v. Holland.

3. Arbitrators award that A. shall have the lands, yielding and paying 10l. per ann. In this case it is not a condition; for it is not knit to the land by the owner itself but by a stranger, viz. the arbitrator. 3 Le. 58. Mich. 17 Eliz. B. R. Trefham v. Robins.

4. A recoveror made a lease for years, proviso that if the lessee dies within the term, his executor shall pay the rent to him who suffered the recovery, this was adjudged a covenant. Mo. 707. pl. 987. cited per Cur. as Mich. 28 & 29 Eliz. Pott's Case.

5. A recital in an indenture, that before the indenture the parties were agreed to do so or so, this was a covenant, as to say, whereas it was agreed to pay 20l. For now the indenture itself confirms the agreement and intent precedent, though it be relative to the former act in pais, when it is declared by deed it is now a covenant by the indenture; per Hale Ch. J. and judgment accordingly. 3 Keb. 465. pl. 47. Pasch. 27 Car. 2. B. R. Barefoot v. Frefwell.

6. A power to dig up trees making up the hedges is not a condition, but covenant lies for not repairing the hedge, 2 Show. 202. pl. 209. Pasch. 34 Car. 2. Anon.

Or Non-
payment of
the rent.
a Brownl,
214. per
Fleming
Ch. J.
[421]

(T) That Vendor &c. has a lawful Estate &c. notwithstanding any Act done. And Pleadings,

And. 134.
pl. 185.
S. C. & S. P.
agreed by
all the jus-
tices, and so
judgment
was given
against the
plaintiff.

9 Rep. 60.
b. 61. a.
Bradshaw's
Case, S. C.
adjudged.
— Jenk.
305. pl. 79.
S. C. ac-
cordingly;
for what
power he
had lies in
the know-

1. COVENANT that the lands are of the value of 1000l. per ann. and so shall continue notwithstanding any act done, or to be done by him; adjudged that the words (notwithstanding any act) extends as well to the time of the covenant made as to the time future, and though they were not then of that value, the covenant was not broken except some act done by him was the cause of it. Cro. E. 43. pl. 4. Mich. 27 & 28 Eliz. C. B. Rich v. Rich.

2. The lessor covenanted, that he had lawful right and estate to lease the lands &c. and in covenant brought by the lessee, the breach assigned was, that the lessor had not a lawful right and estate to make a lease, and so had broke his covenant; adjudged that the covenant being general the breach may be assigned as general, and it lies not in the plaintiff's notice who has the rightful estate, but the defendant ought to have maintained that he was seised in fee and had a good estate to demise; and then the plaintiff ought to shew a special title in some other; but prima facie the count is good, the covenant being general, to assign genera

a general breach; therefore the judgment was affirmed. Cro. J. 304. pl. 6. Trin. 40 Jac. B. R. *Salmon v. Bradshaw*.

ledge of the covenantor, and not of the cove-

nantee. — *Show*. 460. S. C. cited per Cur. and said, that it has always been allowed and agreed for good and sound law. and S. P. held accordingly. *Ibid*. pl. 427. Hill. 1 & 2 Jac. 2. B. R. *Lancashire v. Glover*. — S. C. cited *Ibid*. 473. Arg.

3. A. and B. were jointenants for years of a mill; A. assigns all his interest to C. without the assent of B. and dies. B. after, by indenture, *recites the lease, and that it came to him by survivorship, and grants the residue of the term to J. S. and covenants that J. S. shall quietly enjoy notwithstanding any act done by him*. C. ejects J. S. and adjudged that the words (for any act done by him) did not qualify the general covenant to J. S. Cited per Yelverton J. Litt. R. Mich. 4 Car. C. B. as the Case of *Johnson v. Proctor*.

Yelv. 175. S. C. adjudged and affirmed in error.

— Litt.

R. 807.

S. P. cited per Harvey

J. as adjudged in

Sir Thomas

Earnfield's Case.

4. A. sells to B. and covenants only against him, and all claiming by, from, or under him. B. secured the purchase money, but *before payment* the land was *ejected*, but not by a title under A. but *by a title paramount*. B. sued to be relieved against payment, seeing the land was lost, and was relieved by the Lord Chancellor. *Ex Relatione Churchill*. 2 Ch. Cases 19. 1679. Anon.

Note 1st, if declaration at the time of the purchase treated on, that there was an agreement to extend

against all incumbrances, not only special ones, it could not be admitted. 2dly, The affirmative covenant is negative to what is not affirmed, and all one as if expressly declared that the vendor was not to warrant but against himself, and the vendee to pay, because security absolute without. 3dly, Quare, If this may not be made use of to a general inconvenience, if the vendee, having all the writings and purchase deeds, is weary of the bargain, or on other respects sets up a title to a stranger by collusion? Note, in many cases it may easily be done &c. *Ibid*. 20.

(U) Covenant that he has full Power &c. to [422] convey &c.

1. A. Makes a *lease* by indenture to B. for 21 years, if C. so long lives; C. is dead at the time; this lease is absolute. A. covenants by this indenture with B. that A. has full power to demise this land to B. as aforesaid. In covenant brought by B. against A. upon this, he *need not shew how A. had not full power*; it is sufficient for him to declare generally that A. had not full power; for what power he had lies in the knowledge of the covenantor, and not in knowledge of the covenantee. *Jenk*. 305. pl. 79.

B. need not aver that C. was alive at the commencement of the lease, or at the time of the action brought, nor shew who had the right.

Rep. 60. b. 61. Trin. 10 Jac. adjudged in B. R. and that judgment in Cam. Scacc. *Bradshaw's Case*. — Cro. J. 304. pl. 6. *Salmon v. Bradshaw*, S. C. adjudged in B. R. and in Cam. Scacc. accordingly.

2. If one enters into articles to sell land, and he had not any good title at the time, yet it is sufficient if vendor has a good title at the time of the decree, the direction of the Court being in all such cases to enquire whether the seller ran, but

not whether he *could* make a title at the time of the executing the agreement; per the Master of the Rolls. 2 Wms's Rep. 630. Trin. 1731. Langford v. Pitt.

3. A. articed to sell to B. but *neither at the time of the articles, nor at the time of a decree pronounced thereupon, could make any title*, the reversion in fee being in the Crown, and yet the Court *indulged* him with *time more than once for getting in this title from the crown*, which could not be effected without an act of parliament to be obtained in the following sessions; however, it was at length procured, and B. decreed to be the purchaser. Cited by the Master of the Rolls. 2 Wms's Rep. 630. to have been the Case of Lord Sturton v. Sir Tho. Meers.

(W) To convey at the Costs of &c. as Vendee or his Counsel should advise.

1. **T**HE plaintiff covenanted to make an assurance by a day of lands, as the counsel of the defendant shall advise, *and on perfecting thereof the defendant is to pay 300l. and 300l. more, generally within 3 months when demanded. Breach was assigned in non-payment of the whole.* The defendant pleads *the plaintiff had no estate which he could convey*, to which the plaintiff demurred, in regard this payment is collateral, and the latter is general, without reference to the former; but per Cur. the first depending on the assurance, the latter must be so that is subsequent; so *if no assurance, nor thing is to be paid*, and so the plea of the defendant is good, although the plaintiff avers he was always ready to perfect it, and that the defendant never tendered, nor has paid &c. præter Twisden, [423] who conceived it is at the defendant's peril to cause an assurance, and if the plaintiff refuses to convey by fine &c. then he is liable, else not; but per Cur. this is good in action by the defendant for non-assurance, but here the action is for the money, and so the defendant hath election to plead, as here, or that he tendered special conveyance by advice, and the plaintiff refused; judgment for the defendant nisi. Keb. 734, 735. pl. 15. Trin. 16 Car. 2. B. R. Audley v. Berry.

2. There is a manifest difference between a covenant to make a conveyance *at charge of covenantee*, and a covenant to convey *to covenantee*, and he covenants to be at the charge of it; for in the first case, covenantor is not obliged to perform till tender of the charges; but in the second he is to convey at his peril; and if covenantee will not pay, he has his remedy against him upon his covenant; but where covenant is to make conveyance at charge of covenantee, covenantor ought to give notice to covenantee *what sort of conveyance* he intends to make, that covenantee may judge what charge to tender; per Holt Ch. J. 12 Mod. 400. Pasch. 12 W. 3. Steer v. Shalecroft.

(X) To

(X) To convey. Notice ; in what Cases to be given.

1. IF covenant be to make a *feoffment &c. before such a day*, covenantor ought to give notice when he will make it, that covenantee may be there to receive it ; otherwise if it be to make a feoffment *on a day certain* ; but in that case, covenantor must plead a tender on the last convenient time of that day ; per Holt Ch. J. 12 Mod. 401. Pasch. 12 W. 3. in Case of Steer v. Shalecroft.

2. If *A. covenants with B. to make further assurance with B. at the costs of B. A. ought to give notice to B. what sort of assurance he will make, and then B. ought to tender the costs, and then A. ought to make the assurance ; but if the covenant is, that A. shall make a new demise to B. at the costs of B. (as the covenant, upon which this action was brought, was) or any particular assurance specified in the covenant, then B. ought first to tender the costs, and then A. ought to make the assurance ; for in the former case B. cannot know what costs will be sufficient to tender, before he knows what sort of assurance A. will make ; but in the latter case, by the inspection of the covenant itself, he will know what sort of assurance will be made. Ruled by Holt Ch. J. upon evidence at the trial, at Lent assizes at Southwark. 2 Lord Raym. Rep. 750. March 27. 1 Ann. 1702. Heron v. Treynne.*

(Y) That he is seised in Fee &c. And Pleadings.

1. **A.** Covenants that he seised of Black Acre in fee-simple, where in truth it was *copyhold in fee* according to the custom ; per Cur. *it is no breach of covenant*, and the jury shall give *damage* in their consciences according to the rate that the country values fee-simple land more than copyhold. Noy. 142. Grey v. Briscoe.

2. *Lease of a messuage for years, in which the lessor covenanted, that he was lawfully seised in fee ; lessee brought covenant, and assigned for breach, that the lessor was not seised in fee, and had a verdict. It was moved in arrest of judgment, that the breach was too general, because he did not shew that any other person was seised in fee, nor any cause why the lessor was not seised ; sed non allocatur ; for as the covenant is general, so the breach may be assigned generally ; especially since in this case where the defendant by pleading Non est factum has made the declaration good, and so allows the breach if it had been his deed ; and judgment for the plaintiff. Cro. J. 369. pl. 3. Pasch. 13 Jac. B. R. Muscot v. Ballet.*

[424]

Keb. 58.
pl. 22.
Glimston
v. Audley,
S. C. adjor-
natur.

3. Debt upon a bond conditioned to perform covenants, one whereof was, that the defendant was seised of an indefeasible estate in fee-simple. The defendant pleaded performance. The plaintiff replied, that he was not seised of an indefeasible estate in fee-simple; the defendant demurred generally, because he supposed the plaintiff ought to shew of what estate the defendant was seised, because he had parted with all his writings to the plaintiff, who must therefore well know the title; and it is not like BRADSHAW'S CASE, because there the covenant was with the lessee for years, who had not the writings, but adjudged that the breach was well assigned according to the words of the covenant. Raym. 14. Pasch. 13 Car. 2. B. R. Glinister v. Audley.

(Z) For quiet Enjoyment. And Pleadings.

1. COVENANT was brought by the lessee against the lessor, because the lessor after the lease made a feoffment to one who ousted the lessee, and it was awarded that it lies well; quod nota; and yet the lessee might have had re-entry, or have had quare ejecit infra terminum by the statute, and yet this does not toll the action of covenant which is given by the common law, notwithstanding that quare ejecit infra terminum is given by the statute; but Brooke makes a quære, if he cannot recover against the lessor by the one writ, and against the feoffee by the other writ; for he may recover by two quare impedita of one avoidance. Br. Covenant, pl. 7. cites 46 E. 3. 4.

2. Covenant that lessor might be 4 days a year in the house without being put out, on pain of 100l. The lessor came to enter, and lessee shut the doors and the windows. This was held to be no breach of covenant without saying that the lessee put him out; Arg. Godb. 75. cites 3 H. 4. 8. Br. Conditions, 35.

3. If a termor be ousted by him who has no right, he shall not have covenant against the lessor, for he may have ejectiones firmæ; but if he be ousted by him who has right, there lies writ of covenant. Br. Covenant, pl. 20. cites 22 H. 6. 52.

4. If disseisor leases the land by deed with warranty, and the disseisee re-enters, writ of covenant lies; contra if a stranger enters. Br. Covenant, pl. 40. cites 26 H. 6.

5. In debt, if the defendant pleads condition or defeasance, that he and his feoffees permit N. N. plaintiff to enjoy two houses in D. for 20 years, that then &c. It suffices to say that he and his feoffees suffered him to enjoy them &c. without shewing the names of the feoffees, because sufferance is no act; but if it [425] was that he and his feoffees shall make estate, there it is contra; for this is an act; note the diversity; per Cur. Br. Conditions, pl. 157. cites 17 E. 4. 2.

6. Bond was continued to surrender certain copyholds; and to suffer him and his heirs quietly to enjoy the same without

without interruption of any; the defendant pleaded performance, and that the plaintiff continued peaceably in possession, for a certain time, according to the condition; but that afterwards the rent being arrear, the lord entered for a forfeiture according to the custom. This was held a good plea, so if he was tenant at common law, and the obligee ceased, the obligation is saved; because it was the act of the plaintiff himself. Dyer 30. a. pl. 205. 28 H. 8. Anon.

7. In debt upon bond; the condition was, that whereas W. the obligor had sold a certain meadow to G. the obligee, that he would warrant the same against the king, lord, and all others, and that he should enjoy the same peaceably to him and his heirs to hold of the lord of W. by the services thereof, according to the custom of the manor. The defendant pleaded, that the meadow was copyhold, parcel of the manor of B. the custom whereof was, that if the rent be in arrear &c. the lord might enter for a forfeiture, and that G. was admitted to him and his heirs, and had peaceably enjoyed the lands, and died seised, and that the same descended to his son who did not pay the rent, and thereupon the lord entered for a forfeiture; and upon a demurrer to this plea all the Justices agreed, that when a man binds himself and his heirs to warranty, they are not bound to warrant new titles of actions accrued by the feoffee, or any other after the warranty made, but only against such titles as were then in esse at the time of the warranty, and therefore, because the title to enter, given to the lord by the custom for non-payment of rent, accrued after the warranty, the defendant was not bound to warrant against it. Dy. 42. Mich. 30 H. Greenliff's Case.

8. Bond for quiet enjoyment, as that the lessee shall take, reap, and carry away his corn peaceably, without interruption; lessor coming on the land in harvest when lessee is reaping, and saying that he shall not reap any corn there; though he reaps and carries away, yet it is a forfeiture. Godb. 22. pl. 30. Hill. 26 Eliz. C. B. Anon.

9. Lease for 6 years with a covenant that lessee should enjoy it quietly during the term discharged of tithes, and that if tithes should be recovered, he should recoupe in his hands the value of the tithes so recovered. Covenant lies against lessor if lessee is sued for the tithes after the lease ended, for that is within the intent of the covenant; per tot, Cur. Cro. E. 916. pl. 7. Hill. 45 Eliz. B. R. Lanning v. Lovering.

10. In debt on bond to perform covenants; the covenant was for quiet enjoyment, without let, trouble, interruption &c. The plaintiff assigned the breach, that the defendant forbade the tenant to pay rent to the plaintiff. The Court held this to be no breach, unless there were some other act; and the defendant pleaded, that after the time the plaintiff said, that the defendant forbade the tenant to pay the rent, the tenant paid it to the plaintiff, Brownl. 81. Trin. 9 Jac. Whitecot v. Lindsey.

11. Debt upon *obligation* upon a condition, that where the plaintiff had a *lease for years* from the lessor of certain land, that the lessee *should enjoy this land during this lease without eviction*; the breach was alledged in the replication, in a *recovery* of this land by A. by *verdict*, and upon a *good title*; the *issue* was, that the *recovery* was by *covin*; and it was found for the plaintiff; he had judgment, which was reversed in the Exchequer-Chamber; for A. *might recover* this land by *verdict*, and without *covin*, under a *title derived from the plaintiff himself*; therefore the plaintiff ought to *shew that A. had an elder title* to the said lease made to the plaintiff. Jenk. 340. pl. 45.

[426] 12. In actions on breach of promise or covenant for enjoyment &c. against incumbrances, the plaintiff ought to *shew a lawful incumbrance*. Cro. J. 425. Pasch. 15 Jac. B. R. Broking v. Cham.

13. The lessor made a lease for years, and covenanted that *neither he nor his executors, or heirs, should interrupt the lessee, but that he should quietly enjoy during the term*. In an action of covenant brought for the entry of the executors, it was adjudged that the *plaintiff did not shew that the executors entered by an elder and good title*, for as to the plaintiff it is all one, whether the action is brought against the covenantor or his executors, *but if the entry had been by a stranger, then he must set forth an elder and good title*. 2 Roll. Rep. 21. Pasch. 16 Jac. B. R. Forte v. Vines.

14. G. L. brought an action of covenant against N. M. and declared that C. C. *had granted the next avoidance of the church of D. to T. M. and that N. M. was his executor, and that N. M. assigned this to G. L. his executors, and assigns, to present to the same church when that shall become void, and covenanted that the same person, who shall be so presented by him, shall have and enjoy that without the let or disturbance of the said C. C. or N. M. or any of them, or any by their procurement*; and after G. L. presented J. S. and after J. W. presented another, claiming the first and next avoidance by the procurement of C. C. and ruled that declaration was not good; for it ought to say that C. C. granted to J. W. the next avoidance, and procured him to disturb, and that by his procurement he was disturbed; Athow said, it seems to me to be but little difference to say he disseised me by the procurement of J. S. and he commanded J. S. to disseise me, and he did that accordingly at his command, Win. 4. Pasch. 19 Jac. Lewings v. March.

15. Lease for life by A. to B. A. covenants for him and his heirs, that he would save B. harmless from any claiming by, from, or under him. A. died. A's. wife brought dower, and recovered. B. brought an action of covenant against the heir; adjudged against the heir, because the wife claimed under her husband who was the lessor; *but if the woman had been mother of A. the action would not have lain against the heir, because she did not claim by, from, or under A.* Godb. 333. Trin. 21 Jac. and says it was so adjudged 11 H. 7. 7. b.

16. In

16. In an action of covenant to perform articles, which were, that the plaintiff should hold and enjoy lands free from all titles and incumbrances, and for breach the *plaintiff sheweth that B. died seised, and that his wife had title to dower*, to which the plaintiff demurred; and per Cur. this covenant goes to the land, and there can be no difference between a covenant to discharge the land of all titles, and that the defendant shall hold the lands so discharged; judgment for the plaintiff nisi. Keb. 937. pl. 53. Trin. 17 Car. 2. B. R. Andrews v. Tanner.

17. If a man sells land with a covenant for quiet enjoyment *without any disturbance &c.* these words must be intended a *lawful* disturbance. Vaugh. 119. 122. Pasch. 21 Car. 2. C. B. in Case of Hayes v. Bickerstaff.

18. But per Vaughan. If the covenant be expresses that he shall enjoy his term *without the interruption of any*, whether such interruption be *lawful or tortious*, there the lessor shall be charged for the tortious entry of a stranger, because the covenant can have no other meaning. Ibid. 119.

Cited 8. Mod. 230. Arg. — But where the lessor is himself the disturber the Court will not consider the word lawful, nor drive the lessee to

bring an action of trespass, but he may maintain his action of covenant. a Show. 427. Pasch. 1 Jac. 2. B. R. Crofs v. Young. — Where the words of covenant were, that he should quietly enjoy two closes *against all claiming or pretending to claim any right in them*. This extends to all interruptions whatsoever. 10 Mod. 384. Hill. 3 Geo. 1. B. R. Chaplain v. Southgate.

19. The defendant covenanted *that the plaintiff should enjoy [427] Black Acre without any lawful let, suit, or interruption, immediately after the death of Z. and the plaintiff shews in his declaration that the lands were part of the Duchy of Cornwall and did belong to the king; and that he by his letters patents had conveyed them to J. S. &c.* The defendant demurred *because the plaintiff did not allege an entry*, and so could not be disturbed. Per Cur. the declaration is good enough, for having set forth a title in the patentee of the king, the plaintiff shall not be enforced to enter, and subject himself to an action by a tortious act. Judgment for the plaintiff. Freem. Rep. 122. pl. 143. Trin. 1673. Cloake v. Hooper.

20. The defendant leased lands to the plaintiff, and promised, *that he should enjoy it quietly, without interruption of any person; and the plaintiff shews an interruption, but doth not shew any title in the interruptor, nor any lawful interruption.* The Court gave judgment for the plaintiff, upon the authority of Dyer 328. and Hob. 35. And Wyld said, that where in a deed a man covenants, *that he hath a good right to convey &c. and that the party shall quietly enjoy, one covenant goes to the title, and the other to the possession.* Freem. Rep. 450. pl. 612. Pasch. 1677. Anon.

21. In covenant the plaintiff declared on a *demise of a messuage to the defendant together with a garden, and an house of office at the upper end thereof, and covenanted for enjoyment of the premises so demised, and assigns a breach, that the defendant had built a house on part of the garden, whereby the plaintiff could not have*

have the use of the garden, according to the form and effect of the demise; the defendant pleaded, that notwithstanding the said building, the plaintiff might have the use of the garden according to the true intent of the said demise, and *traversed, that the building did hinder the plaintiff from the use thereof, according to the true intent of the said indenture*; and upon demurrer it was adjudged, that the use of the garden is the use of the whole garden, and not a passage only to the house of office; and the traverse is of more than alleged in the breach secundum veram intentionem of the said indenture, and the Court cannot understand the true meaning of the indenture but only by the words in it; and judgment for the plaintiff. 3 Lev. 167. Trin. 36 Car. 2. C. B. Kidder v. West.

22. A *suit in Chancery for waste*, though groundless, is no interruption or disturbance within the covenant for quiet enjoyment *without any manner of interruption*, it not touching the lessee's estate or title. 2 Vent. 214. Mich. 2 W. & M. in C. B. Morgan v. Hunt.

a Vent. 79.
S. C. in
C. B.—4
Mod. 43.
in B. R.

23. All which said *profits, salaries, pensions &c. of the said office I do hereby engage myself, that the said A. shall receive and enjoy during his life, and that I will not receive any part thereof during A.'s life*. This was a covenant from one that was admitted to an office to him that resigned the same. The Court of Common Pleas were of opinion that this agreement did not bind the covenantor to *pay the money*. But Holt Ch. J. and Eyre doubted of that matter; but all agreed that A. must shew for breach that he could not receive any of the money. Carth. 189. Mich. 3 W. & M. in B. R. Killigrew v. Sayer.

Skinn. 397.
pl. 31. S. C.
held accordingly. —
1 Salk. 196.
pl. 2. S. C.
the Court inclined
that the plea
was good,
but held
clearly that
[428]
if it had
been relinquit
ad solvendum
it had
been good,

24. Covenant in an assignment of a lease, *that the assignee should quietly enjoy &c. free and clear of and from all arrears of rent*; the breach assigned was, that the *rent was arrear*, and not paid; the defendant *pleaded that he left so much money in the hands of the plaintiff, as intentions to pay it over to the lessor in discharge of what rent was then arrear &c.* And upon a demurrer this plea was held good notwithstanding the objection, that the intention was put in issue; for if it had been ad solvendum, it would have been good, and in this case the plaintiff might have replied, *Non reliquit &c. in manibus suis ad solvend. &c.* 4 Mod. 249. Mich. 5 W. & M. in B. R. Griffith v. Harrison.

been good, and that non reliquit modo & forma had been a good traverse.

25. Vendor covenanted that vendee should enjoy, *quietly and clearly acquitted of and from all grants &c. rents, rent-charges &c. whatsoever*. An annual rent of 11s. 6d. was payable thereout to the lord of the manor, as a *quit rent incident to the tenure of the lands sold*. This, though there were no arrears due of the said quit rents, was held per tot. Cur. clearly a breach of covenant, and judgment accordingly. Comyns's Rep. 180. Trin. 8 Ann. Hammond v. Hill.

26. A covenant to enjoy *without disturbance generally* shall be construed a disturbance by legal title, but where a man covenants expressly against those who claim or pretend to have a right, the breach is well assigned though the disturber has no legal right. Comyns's Rep. 230. pl. 127. Mich. 2 Geo. C. B. Southgate v. Chaplain.

10 Mod.
383. Hill.
3 Geo. 1.
B. R. Chaplain v. Southgate.
S. C. accordingly, and the

Court said, that so was the plain intent and meaning of the parties; for if it was to extend to legal claims only, then the tenant would be put under the hardship of trying the right for the landlord; which was the very thing the tenant plainly designed to prevent by this covenant.

27. A. covenants that B. shall quietly enjoy, *and that he will not do any thing to molest, hinder &c.* Setting up a gate across a lane, through which there was a way to the land, is a breach; adjudged in C. B. and affirmed in B. R. It was urged for the plaintiff in error, that nothing appeared in the replication to shew that the setting up the gate was unlawful; for there may be another way which might make it necessary and lawful to set up a gate. But per Cur. this appearing to be a necessary way for the enjoyment of the close it is not material to B. whether it is set up by right or wrong. For in either case, if it is an *obstruction*, it ought not to be erected there. 8 Mod. 318. Mich. 11 Geo. Andrews v. Paradise.

(A. a) That it is clear of, and discharged of Incumbrances, and shall be saved Harmless.

1. IF a man be bound to make a feoffment of certain land discharged, and after makes the feoffment and seignior is issuing out of it, yet the bond is not forfeited; for this is a thing of common right. Br. Conditions. pl. 126. cites 3 H. 7. 14.

2. The Earl of H. covenanted with the Lord C. to make him a good sure sufficient and lawful estate in fee-simple of the manor of D. before Easter, *discharged of all former incumbrances except leases, where upon the ancient rent, or more is reserved*; after, and before the feoffment *he made a new lease rendering the ancient rent.* By the opinion of 4 contra 2. it is no breach. Dy. 159, pl. 34. Hill. 4 P. & M. Huntington v. Clinton.

3. A. bargained and sold land, and covenanted that it should be discharged of all charges. *He had granted a rent before to begin 20 years after*; when the rent begins it shall be said a breach. Arg. Goldsb. 59. cites it as adjudged in 8 Eliz.

4. A man levies a fine of certain land, and after covenants that the land is discharged of all acts and incumbrances done by him, and in truth the *post-fine was not paid.* Per Dier it is clear that the covenant is broken; for all the lands of him that levies the fine are chargeable for the post-fine, and especially

cially this land of which the fine was levied. Dal. 78. pl. 11. 14 Eliz.

5. Covenant &c. upon an indenture reciting a lease made by D. B. of a messuage &c. in which indenture the defendant covenanted, that the original lease was good and not incumbered; then he assigned the breach, that A. and B. claimed a title under the defendant to part of premises, by virtue of a lease which he made to them; the defendant pleaded as to parcel, that A. and B. had no title under him, and as to the residue, that the plaintiff had notice of the lease before the defendant assigned the original lease to the plaintiff, and that after the death of A. the other tenant B. attended tenant to the plaintiff, upon demurrer to this plea the plaintiff had judgment. 1 Lutw. 317. Levett v. Witherington.

(B. a) That the Lands are or shall be of such a Value. Extent thereof.

1. A Covenant that lands limited in jointure with several limitations over, shall continue for ever of the annual value of 200l. extends to all the limitations as well as to the jointure estate. Lord Raym. Rep. 365. Mich. 10 W. 3. Anon.

2. If H. limits an estate to A. for life remainder to B. for life, remainder to the 1st. 2d. &c. son of their 2 bodies, remainder to his own right heirs, with such a covenant annexed to it, that the lands should be and for ever continue of the value of 200l. a year, it will extend to the estates for life, and the estates tail; but if for default of issue of the bodies of A. and B. the reversion descends to the collateral or lineal heir of H. he shall never take advantage of it, because he is not privy to the consideration of the deed nor party to the deed, nor is his estate raised by the deed. But if in such case the remainder had been limited to the right heirs of A. or B. or of J. S. they might sue upon this covenant because they had taken by the limitation of the deed, and are privy to it. Per Holt Ch. J. Lord Raym. Rep. 366. Mich. 10 W. 3. Anon.

(C. a) Where it restrains the Generality of the Grant &c. the Covenant being particular, and referring to Words, viz. until &c. shewing the Intent.

5 Rep. 23.
b. in Lamb's
Case, cites
S. C. and
S. P.

1. A. Is bound to B. to make him a sure and sufficient estate of the manor of Dale by the advice of J. S. If J. S. advises the estate, and it is not sufficient, yet the obligation is saved; by the Justices of both benches; qui amat periculum in periculo peribit. If the condition of the obligation had

had been to make him a *sure estate*; the obligor is to do it at his peril. If it be to make a sure estate *as the obligee or his counsel shall advise*, the obligee ought to certify what estate he will have, and if it be not sure, yet the obligation is not forfeited; for it is left to the judgment of the obligee and his counsel to advise a sure estate. Jenk. 128. pl. 60. cites 7. E.

[430]

4. 13.

2. In a lease by demise, grant &c. there was a covenant for lessee's quiet enjoyment without eviction by lessor or any claiming under him; it was held by Popham Ch. J. and the whole Court, that *the said express covenant qualifies the generality of the covenant in law*, and restrains it by the mutual consent of both parties that it shall not extend further than the express covenant; for *clausula generalis non refertur ad expressa*. 4 Rep. 80. a. Trin. 41 Eliz. Nokes's Case, alias, Nokes v. James.

Cro. E. 6-4. S. C. & S. P. held by Popham; but judgment was given on the pleading.

3. A. and B. jointenants for years of a mill; A. grants his moiety to J. S. and dies; B. not knowing of the grant by A. and so thinking himself intitled to the whole as survivor grants a mill, lands &c. and all his estate, title &c. in it to J. N. and covenants that J. N. shall enjoy for any act by him &c. J. S. evicted J. N. of a moiety; adjudged and affirmed in error that covenant lies. For this case is not like to Nokes's Case 4 Rep. 80. b. For there the grant was *once good for the whole* and became ill by eviction afterwards, and therefore the covenant ensuing qualified the general covenant. But here the grant according to the purport of it *never was good*; for B. had no power to grant the moiety of A. that being granted away by A. to J. S. and yet in B.'s grant to J. N. he has expressly granted the mill, and land &c. so that the grant being *defective at first as to a moiety*, which is the substance and agreement of the parties, this does not qualify the general covenant. Per tot. Cur. Yelv. 175. Pasch. 5 Jac. B. R. Johnson v. Proctor.

Cro. E. 609. pl. 13. S. C. adjournatur. — Cro. J. 233. pl. 2. S. C. adjournatur. — Bull. 9. S. C. adjudged in C. B. and judgment affirmed in B. R. by 4 Judges against one. — 2 Brownl. 212. Proctor v. Johnson, S. C. adjudged nisi &c. and nothing was said. — S. C. cited

by Yelverton J. as a case in which he was of counsel. Litt. Rep. 205, 206. Mich. 4 S. C. cited Arg. & Show. 430.

4. Tenant in fee-simple grants 100 trees to B. and covenants that B. may take them within 5 years; the grant implies an absolute liberty to B. to take; but if the covenant were on the part of B. not to take after the 5 years it would not extinguish his property, nor consequently his power to take them after the 5 years, and therefore if he took them he might plead not guilty in trespass but should be answerable to an action of covenant for it; per Hobert Ch. J. Hob. 173. Hill. 12 Jac. in Case of Stukely v. Butler.

5. Condition was that if A. shall truly exercise his office of &c. and also shall quarterly make his account of all monies by him received for customs, and pay all monies by him received, and do account at such times as he shall be thereunto reasonably required that then &c. the clause of *reasonably required* goes only to the

payment of the money being the last antecedent, and also the account is limited to be made quarterly and expressed by words, and therefore the words cannot extend to it. Litt. R. 101. Trin. 4 Car. in Scacc. The King v. Points.

[43^r] 6. In covenant the plaintiff declared, that the defendant sold lands to him which he had purchased of one Woolaston, a trustee for the sale of delinquents estates, and covenanted, that he was seised of a good estate in fee according to the indenture made to him by Woolastone and assigned the breach, that he was not seised of a good estate in fee; the defendant pleaded, that he was seised of as good an estate as Woolaston &c. conveyed to him; the plaintiff demurred and had judgment; for the covenant was absolute that he was seised of a good estate in fee, and the reference to the conveyance by Woolaston serves only to the limitation and quantity of the estate, and not the defeasibleness or indefeasibleness of the title. Lev. 40. Trin. 13 Car. 2. B. R. Cook v. Founds.

7. The defendant granted a fee-farm rent to the plaintiff, and covenanted that he was seised in fee, and had good right to sell; and in an action of covenant the plaintiff assigns the breach, that the defendant had no good right to sell, he having purchased it of the late trustees for the sale of the king's lands, pleaded that it was farther agreed in the indenture, that all the covenants therein should not extend farther than to acts done by the vendor and his heirs; whereupon the plaintiff demurred, and though it was placed at the end of the indenture far distant from the other covenants it was adjudged, that this had qualified the first covenant, and restrained it to acts done by the covenantor. Lev. 57. Hill. 13 & 14 Car. 2. in B. R. Brown v. Brown.

Keb. 775.
pl. 11. S. C.
adjournatur.

8. Lessor of certain gravel pits in Black-Acre covenanted that he, his heirs, assigns, or under-tenants, would not dig or sell any gravel there. In covenant brought by the lessee he assigned the breach, that J. S. an under-tenant, dug and sold gravel in other pits in Black-Acre. It was objected, that covenant extended only to the pits demised; but the Court held, that it ought to be intended of other pits in the close, and not of those demised to the plaintiff, and judgment for the plaintiff. Lev. 144. Mich. 16 Car. 2. B. R. Burman v. Aston.

9. A prior covenant shall not be restrained by a subsequent one when they make but one entire sentence, and not distinct covenants, in which case the construction must be upon the whole sentence. Saund. 58. Pasch. 19 Car. 2. Gainsford v. Griffith.

10. So where there are restrictive words at the end of the last sentence, and may be indifferently applied to both the precedent sentences. Ibid.

11. And a general covenant in law may be restrained by a particular covenant in fact. Ibid.

12. Again if a restrictive clause be in the first or the last part of a sentence, or at the beginning of the first or at the last sentence, which in good sense may be applied either to the one

one or the other, there it shall extend to both sentences. Ibid.

13. But if such a sentence be placed in the middle of one or both sentences, contra. Saund. 66. Pasch. 19 Car. 2. Gainsford v. Griffith.

14. In the condition of a bond to perform instructions in a paper annexed &c. reciting, that whereas Lord A. had deputed J. deputy post-master of the stage of O. to execute the said office for 6 months, if the said J. shall for and during all the time that he should continue post-master &c. perform the instructions in a paper thereunto annexed &c. Here, though the words (during all the time &c.) are indefinite, yet by the intention of the condition the obligor is not to be answerable for T. for any more time than the 6 months; the condition shall refer to the recital only. So in a condition it was recited, that a sheriff had constituted such a one to be bailiff of a hundred &c. if therefore the said defendant should execute all warrants to him directed then &c. Warrants here are only such as were directed to him as bailiff of the hundred, and not other warrants. 2 Saund. 413, 414. Pasch. 23 & 24 Car. 2. Lord Arlington v. Merrick.

3 Keb. 45, pl. 21. S. C. judgment for the defendant nisi. — Ibid. 59. pl. 40. S. C. it is apparent that the deputation was but for six months, and the security was bound no longer; and had it been during the continuance of the said deputation is

had been out, and here it is all out; and judgment for the defendant.

15. Where the generality of the covenants were restrained to acts of his own, but there was one covenant absolute, as that he had good and lawful power to grant &c. which was contrary to the intent of the parties and the tenor of the deed, it was relieved. Fin. R. 90. Hill. 25 Car. 2. Feilder v. Studley.

16. Charles Harward in consideration of marriage, and marriage settlement, covenants "That he the said Charles Harward shall and will, by deed or deeds in his life-time, or by his will, give, grant, convey, settle or devise for ever, all other his lands &c. and all right, title &c. after his and his wife's death, unto the said Katherine his daughter, and such child or children of her the said Katherine his daughter by A. C. her intended husband, to be begotten, in such manner and proportion as to him the said C. Harward shall seem meet, and shall not, neither will, give or grant to the said Katherine his daughter any further or other estate therein than for her life; provided that the said Katherine, or any child or children of the said Katherine, by the said A. C. to be begotten, shall be living at the time of the death of him the said Charles Harward, and not otherwise."

[432] MS. Rep. 16. June, 1735, Chichester v. Bradford & Ux.

Lord Chancellor said, The first thing is as to the construction of the covenant; the next thing is as to the rents and profits of the estate of Charles Harward.—By the covenant he put himself under an obligation to dispose of the whole estate subject to the estate for life to his wife.

By the will he gives the whole estate to trustees and their heirs, to the use of his grandson for life, remainder to his first and other sons in tail, then to his grand-daughter, and

the heirs of her body, remainder to his own right heirs, i. e. to his daughter, who is his heir at law. He directs that his trustees should present such person to the church of Tallerton as his daughter should appoint. All the benefit that his daughter was to have out of his estate, was the next presentation to Tallerton as his daughter should appoint (probably he intended the second husband), and the remainder in fee, although she took the same by descent, not properly by the devise.—And what arises by this covenant?

On this covenant there are two questions:

1st. Whether Charles Harward was under a necessity of giving any thing at all to his daughter? if not under a necessity, whether the disposition he had made in favour of his grand-children was good or not? And then another question, that supposing he was under a necessity of giving something to his daughter, what that something was? Whether she was to have an estate in the whole, or whether it was in his power to adjust the proportions between her and her children, and leave her some minute thing or part?

The words are, unto Katherine his daughter, and such child or children, and if the word (or) disjoins the whole, then it is clear he had an election to give to any child, or to all the children exclusive of the daughter, and it would be equally clear to give it to the daughter, exclusive of the children, were it not for the restrictive words, which exclude him from giving her a greater estate than for life.

In the cases mentioned (to wit), Co. Litt. 225. a. 1 Le. 74. Mo. 239. the rule is laid down generally (See the Books), but cases may happen from the different penning of the clauses, where the intent of the parties may appear so clear, that a conjunctive shall stand for a disjunctive, and a disjunctive for a conjunctive, but the Court ought not to do violence to the words where there is not any thing in them to take away the natural sense and meaning of those words.

In this case, if the words had been only to the daughter, and to such child &c. as to him should seem meet, then the daughter must have had something; but the word (or) afterwards makes the difficulty.

[433] If the words had been, I give to my daughter, and such child of my daughter &c. as he should think fit, or to my daughter and the children of my daughter, there would be no necessity there should be a construction to vary the words, or put (or) for (and), but here there is no violence done to the words to use the whole in the disjunctive, it may be taken in that sense, and therefore he rather thought they would be taken in the disjunctive sense throughout.

Provided that the said Katherine, or any child or children &c. What event was here to be provided for? If the daughter, or any child or children were living, the provision was to take place.

If

If in the beginning the words are to be taken in the conjunctive, so as to oblige him to give something to the daughter, then the last words, which are plainly in the disjunctive, would bind him to convey to his daughter though his daughter was dead. Another reason why he thought the words should be taken in the disjunctive sense was, from the other provision that was made, that he should not, nor would give or grant to his daughter any further or other estate than for life.—He is bound to make a disposition of the whole; he might give the whole to his daughter, but that was not his meaning—This is put upon him by negative and restrictive words—The family, not the daughter only, but the issue of the marriage, was chiefly under the consideration of the parties.

With regard to the daughter, he might chuse whether he would or would not give any thing to her, but he might give her an estate for life if he thought fit.

Another reason, and that is from the whole tenor of the covenant. If the words (in such manner and proportion as he should see meet) refer to the children only, and the power of disposition is not over the whole, and the daughter must have an estate for life in the whole in all events, it would be an absurd provision to say, I give to my daughter, or her child or children &c. provided that I do not give her more than an estate for life, is plain, if not, to put them all under one restriction, that negative is far from affording an argument for the construction contended for, for the event was uncertain whether she should have children or not.

But if the daughter was under the power of her father, he might give her as minute a part as he thought fit, if he was under a necessity of giving something to her, what that was to be was in his discretion, but not more than an estate for life.—A further reason for taking the words in the disjunctive is, that it seems to have been the intent, and to be stipulated that he might give to one, or 2, or to 3 &c. in such proportion as he thought fit.

But he relied chiefly upon the words of the proviso (provided that said Katherine, or any child or children &c.)—The authorities seem to warrant this disjunctive sense, but the reason of the thing that arises from the same place and words doth warrant this construction. And as to the negative words, that he should not, nor would give or grant any further or other estate, do refer to the subsequent words (for her life.) It was to be left in doubt, whether he should have even that, or not, and the other clauses will fall in with it when the whole is taken disjunctively.—He has done as far as he was bound to do, he was obliged to convey the inheritance for ever, he has by his will given to his grandson an estate tail, remainder to his grand-daughter in tail, remainder to his right heirs.

His Lordship's present thoughts were, that Charles Harward had understood the covenant in the right way, that he would not take any thing from the grand children which he had given them, but the rents and profits are to go for the benefit of the plaintiff Charles; and decreed accordingly.

[434] (D. a) Negative and Affirmative Covenants, Construction and Pleadings,

1. *AFFIRMATIVE* covenants do not take away the power which the law gives; as where lessor covenants that lessee may take hedge-boot &c. by assignment, yet he may take it without assignment; Arg. Cro. J. 481. cites D. 19, [b. pl. 115. &c. Trin. 28 H. 8. Anon.]

Hob. 173. cites S. C. that lessee may take it without assignment, but otherwise had it been in the negative.

2. Lessor covenanted that lessee shall have sufficient hedge-boot by assignment of the lessor's bailiff; Bauldwin and Fitzherbert held that he may take it without assignment; for the law by implication gives it to him, but Shelly e contra. D. 19, b. pl. 15. 28 H. 8.

Ibid. Marg. pl. 117. cites Mich. 40 & 41 Eliz. C. B. Brown v. Eyre, where the lord granted to the termor to take boote per visum custodis, and there

3. If A. leases 2 acres of meadow to B. and covenants that it shall be lawful for B. to cut the grafs at the assignment of A. yet B. may cut the grafs notwithstanding thole words; but if B. covenants on his part in a negative, action of covenant will lie; or if it was a condition, which is a negative in law, as proviso that he shall not &c. without assignment &c. in this case if he does, then clearly A. may enter; but in the other case it is a grant of the lessor in the affirmative; per Baldwin and Fitzherbert; but Shelley e contra. The Reporter adds, quære bene casum. D. 19. b. pl. 116, 117. Trin. 28 H. 8.

Anderfon held, that this being in the affirmative the law clearly does not take away the liberty given to the termor by the law, but that he may well take without view of the keeper, quod Glanvil concessit, unless it be according to 49 E. 3. 91. quod non liceat capere nisi per visum custodis &c.

4. Debt on bond for performance of covenants in an indenture, whereof some were in the affirmative, and some in the negative; defendant pleaded a performance of all the covenants generally. Upon demurrer it was adjudged for the plaintiff. Cro. E. 691. pl. 29. Trin. 41 Eliz. B. R. Cropwel v. Peachy.

5. In debt upon an obligation conditioned to perform covenants of under-sheriff's bailiff, part in negative, part in the affirmative, the defendant as to those in the negative pleaded negatively, and those in the affirmative, that he had observed them; to which the plaintiff replied, that the defendant was not assisting at the arrest of J. S. to which the defendant demurred; the Court conceived the plea ill, without shewing how he had performed them, and yet the replication is good to shew a cause of

of action; for the naughty plea was a trap that the plaintiff should have demurred, and so no cause of action would appear; judgment for the plaintiff nisi. 2 Keb. 405. pl. 21. Mich. 20 Car. 2. B. R. Clavell v. Galler.

(E. a) Distinct and Independent Covenants. [435]
What shall be said such.

1. **A.** Covenanted, *that notwithstanding any act done by him, he was seised in fee, and also, that there was no reversion in the Crown, and further, that it was of the annual value of 300l. a year.* The Court upon the first argument resolved, that the last covenant was absolute and distinct, and had no dependance upon the first part of the covenant. Cro. C. 106. pl. 8. Hill. 3 Car. C. B. Crayford v. Crayford. Litt. Rep. 80, 81. Crayford v. Crayford, S. C. held accordingly by all the Court, and adjudged for the plaintiff.—

S. C. cited by North Ch. J. 3 Lev. 46. Trin. 33 Car. 2. C. B. in Case of NERVIN v. MILLS, which was, viz. Covenant &c. in which the plaintiff declared on a scottment of lands, wherein the defendant's testator covenanted, *that notwithstanding any thing by him done, he was seised in fee, &c. without any condition &c. And adly, That he had full power to sell. And 3dly, That the lands were clear of all incumbrance by him or his father. And 4thly, That the feeoffee should enjoy against persons claiming under him, his father, or grandfather, and assigns the breach, that the testator had no power to sell.* Upon demurrer it was agreed, that *these were distinct covenants*, and 3 Judges against North Ch. J. held, that though the covenants are distinct, yet the two first are of the same import; for if he is seised in fee he hath power to sell, and when by the first he covenants only against his own acts, it can never be intended, that immediately by another covenant of the same effect he would covenant against the whole world. Now in CRAYFORD'S CASE the covenants were of different natures, and concerning different things, though of the same lands; but in this case the two subsequent covenants are particular and restrained, and therefore the middle covenant shall not be indefinite and general.

(F. a) Not to alien &c.

1. **L**ESSEE for years covenanted, that if he, or his executors, or assigns, did alien, it should be lawful for the lessor and his heirs to enter; *lessee afterwards made his wife executrix, and died; she married again, and the husband being possessed of the term in right of his wife, who was executrix as aforesaid, aliened the said term.* Baldwin Ch. J. held this no breach of the condition, for that the second husband cannot be said assignee; his estate being given him by the law, and not by assignment of any, no more than a tenant by the curtesy &c. But Brown and Shelly held, that the husband was assignee in law, and that an assignment in law is an assignment in deed, and that the lands are subject to the condition in whose hands soever they shall come. D. 6. a. b. Pasch. 28 H. 8. Anon.

2. *Lessee for years covenanted that he would not assign the land, or any part thereof, without the consent of the lessor. The lessor, during the term, entered into part of the land demised, and then the lessee assigned the residus of the term in the rest of the land, without the consent of the lessor. Lessor brought covenant.*

Roll Ch. J. held, that the covenant was collateral, and consequently broken by the assignment of the term, notwithstanding the lessor had entered on part of the lands; and judgment nisi. Sty. 265. Pasch. 1651. Collins v. Shelley.

3. Lessee covenants *not to assign* his term without the lessor's consent in writing. If lessee *devises the term* to J. S. without the lessor's consent, it is no breach; for a devise is not a lease; sic dictum fuit. Sty. 483. Mich. 1655. B. R. in Case of Fox v. Swan.

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(G. a) For further Assurance,

3 Le. 1.
pl. 9. Anon.
S. C. held
accordingly.

1. **A.** *Bargained and sold* his lands to B. in fee by deed indented, and *covenanted to make to the vendee a good estate in fee before Christmas* next following; afterwards, and *before Christmas, the bargainor caused the deed to be enrolled*; the question was, whether he had performed his covenant without doing more? The Court held that he had not, but that he ought to have levied a fine, or *made a feoffment before Christmas*; and so it seems, that where the feoffment had been made before the enrolment, the fee had passed thereby, and not by the enrolment. And. 27. pl. 61. Mich. 6 E. 6. Anon.

2. Baron and feme make lease for life, and the covenant was, that he should make such reasonable assurance *as the counsel of lessee should advise*, and the counsel advised a *fine with warranty* by the husband and wife with warranty against the baron and his heirs. Defendant refused; covenant was brought, and it was moved, that it was not a reasonable assurance to have a fine with warranty, because the warranty did trench to other land; but per Cur. it is the ordinary course in every fine to have a warranty, and the party may rebutt the warranty. Godb. 435. pl. 499. Pasch. 3 Car. B. R. Goad v. Winch.

Gilb. Equ.
Rep. 139.
Turfaker v.
Robinson,
S. C. in tot-
ridem ver-
bis,

3. A covenant for further assurance *will not be assised in chancery where the original conveyance itself is void*; as if a man covenants to stand seised to the use of a mere stranger; and covenants to make further assurance, this covenant depending on the nature of the conveyance, if that be void, the covenant which is only auxiliary, and goes along with the estate, must be void too. Arg. Ch. Prec. 476. pl. 298. Mich. 1717. and decreed accordingly. Turfaker v. Robinson.

(H. a) What are mutual Covenants; and Pleadings.

1. **THE** plaintiff covenants, *that if the defendant would pay 40l. he would convey as the counsel of the defendant should advise*; these being mutual covenants cannot be pleaded in

in bar one of another, which was assigned for error, and judgment affirmed nisi. Keb. 178. pl. 143. Mich. 13 Car. 2. B. R. Hames v. Bailly.

2. Covenant to pay an annual rent of 60*l.* and to repair. Plaintiff says defendant entered, but does not aver a lease made. Defendant pleads he ought not to have rent because no lease was made. Per Holt, in mutual covenants where the performance of one does depend upon another, the precedent covenant must be performed first. Per Eyres and Dolben, the covenant and entry amount to a lease; and so was HARRINGTON AND WISE's Case; but per Holt; it has been held aliter ever since; judgment for the plaintiff. 12 Mod. 1. Mich. 2 W. & M. in B. R. Copley v. Hepworth.

8 Selk. 108. pl. 8. S. C. which is thus, viz. that Covenant was brought up on articles of agreement &c. wherein the plaintiff

covenanted with the defendant facere dimissionem to him of a mill, paying 50*l.* rent per ann. for so many years, and the defendant covenanted to pay the rent during the term: the plaintiff brought this action for non-payment of rent, in which he set forth that the defendant entered and enjoyed the mill &c. The defendant pleaded, that the plaintiff did not make any lease to him; and upon demurrer to this plea it was adjudged, that these articles did not amount to a lease, being only a covenant facere dimissionem, and Holt Ch. J. held, that the making a lease was a matter precedent, and that the plaintiff could not be intitled to the rent till a lease was made; but Eyres, Dolben, and Gregory Justices contra, because these are mutual covenants, and equal remedies are on both sides; and it is alledged that the defendant entered, but upon the other point the defendant had judgment upon arguing the demurrer. Mich. 2 W. 3. [437]

3. In debt on a deed, in which the plaintiff in consideration of 1100*l.* to be paid to him by the defendant, covenanted to assign to the defendant 10 shares in the corporation of linen manufacture on the 30th of January next, and the defendant covenanted that he would then accept those shares, and at the same time pay the plaintiff the said 1100*l.* &c. Both parties bound themselves to each other in the penal sum of 2200*l.* to perform covenants. Breach was assigned in non-payment of the 1100*l.* on the said 30th of January after the date of the indenture. It was insisted for the defendant, the assignment ought to precede the payment, because the covenant to pay it was in nature of a condition or defeasance to save the forfeiture of the 2200*l.* and therefore the condition shall be taken most favourably for the obligor, so that if it may have 2 intendments the best shall be taken for him. And by the resolution of the Case in D. 17. a. the payment in the present case must relate to the acceptance of the assignment, and not to the day of making it, and if so, it was impossible defendant should accept it before it was made; so that the true meaning was, that the plaintiff should assign the shares on the 30th of January, and the defendant should accept it, and upon such acceptance the money should be paid; and of this opinion was the whole Court. Lutw. 490. 492, 493. Pasch. 5 W. & M. Elwick v. Cudworth.

4. Covenant upon articles of agreement between the testator S. and the defendant, by which it was covenanted and agreed between them, that S. should assign to the defendant his interest in a house &c. and that the defendant should pay to S. 30*l.* The plaintiff assigns for breach, that the defendant has not paid the 30*l.* &c. The defendant pleads, that S. did not assign

assign his interest in the house to the defendant. The plaintiff demurs; and adjudged for him, because these are mutual and independant covenants, and the parties may have reciprocal actions, and therefore the plaintiff may bring his action before the assignment of the house, and the defendant has a remedy after, if the other party does not perform his part. Lord Raym. Rep. 124, 125. Mich. 8 W. 3. Trench v. Trevin.

5. The plaintiff's testator *undertook a voyage to Russia*, and there was to observe the orders of the defendant's brother, which was *to draw the Czar of Muscovy's tooth*. The defendant paid him 56*l.* and covenanted to pay him 100*l.* more such a day of January then following, and for non-payment of this 100*l.* an action of covenant was brought. The defendant pleads, that the plaintiff's testator did not perform his part of the agreement; but it was held, that the *agreement here was reciprocal, and not conditional*, and the defendant must bring his action for not performing of the agreement on the plaintiff's part; and this is not like where I promise to give a man money for building a house, here I am not to pay the money until the house is built, and here likewise is a day certain when the money is to be paid. Judgment per Quer. Mich. 7 Ann. B. R. Sheffield v. Styles.

[438] 6. A lease for years was made *rendering rent, and a covenant to repair, with a re-entry for non-performance*. Ejectment was brought, and breach assigned generally for non-performance of covenants. The lessee's agent asked lessor what rent was due, and that it should be paid him; but lessor replied, he would not trouble himself about the rent, but would set aside the lease; and the defendant being prepared to prove a tender pleaded performance generally. At the trial the defendant offering to prove the tender, the plaintiff did not insist on the non-payment of the rent, but proved a breach of covenant for *not keeping a barn well thatched*, and found for the plaintiff. The defendant was turned out of possession, and after brought his bill for relief against the said verdict, and to have a new lease granted for so much of the term as was not expired. Per Cur. if a bond had been given for performance of the covenants this court could not relieve against it; but Lord Chancellor said, he could not apprehend what damage the lessor could sustain if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term; and therefore referred it to a master to see what damage was done (if any) for non-performance of covenants; and at what time &c. 2 Mod. Cases 90. Hill. 10 Geo. 1. Hack v. Leonard.

7. It was admitted Arg. that where *covenants are mutual* an action will lie for either parties, without *averring performance* on his part, though *one is the consideration of the other*, and though pro or in consideration is in the declaration. 8 Mod. 294. Trin. 10 Geo. in Case of Shelbourn v. Stapleton.

(I. a) Determined and waved. In what Cases,

1. **A.** Sold lands to B. and it was covenanted betwixt them, *that A. upon request made unto him or his heirs should make assurance to B. of the said land. A. is attained; now the covenant is suspended, for A. has not any heir; afterwards the heir of A. is restored by parliament with a saving to others all their rights &c. B. is not aided by that saving so as he can make request to the heir of A. &c. 4 Le. 174. cites Clovell v. Moulton.*

2. *A. leases by deed to M. for 10 years, and M. covenants at the end of the term to leave four acres of land fallowed and plowed, and in that there was also a proviso, that if M. mislikes his bargain, that upon a year's warning he may surrender his estate, and after M. surrenders accordingly, but had not left any fallowed; and adjudged by the Court that that acceptance of the surrender has not dispensed with the covenant. Noy 118. Austin v. Moyle.*

3. *Otherwise it had been if the proviso had been in the end of the 10 years, for then if the lessor accepts the surrender before the 10 years expire, it is impossible for the lessee to perform the covenant; judgment that the plaintiff should recover. Noy 118. Austin v. Moyle.*

4. *The defendant sold lands to the plaintiff, and covenanted that he had a good title and right to sell, and there was a proviso in the deed, that if 100l. was not paid at a future day, that the grant, and bargain and sale and all should be void. The money was not paid at the day, and so the estate was void; but yet the plaintiff brought an action of covenant, for that the defendant had no right to sell; and the defendant demands oyer of the deed, and demurs. The question was, whether the estate and all being void by the non-payment of the money, an action of covenant would lie? And the Court inclined it would, for there was an action attached in the bargain immediately upon the sealing of the deed, which cannot be defeated by the non-payment of the money, for he might have brought his action as soon as the deed was sealed; but if the words had been, that the indenture shall be void, it would have been stronger against the plaintiff, for then there would have been nothing to ground his action upon. Freem. Rep. 41. pl. 48. Trin. 1672. Raynolls v. Woolmer.*

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5. *A. covenants with B. to pay 20l. at his marriage, or when J. S. shall die, which shall first happen; though B. brings no action when J. S. dies, he may when he afterwards marries; for per Cur. though the plaintiff was entitled to his action upon the first contingency, if he tarry till the second happen, it is but in his own delay, and the defendant shall not take advantage of it; judgment for the plaintiff. Lord Raym. Rep. 133. Mich. 8 W. 3. Loggia v. Orrery (Lord).*

(K. 2)

(K. a) Count.

1. COVENANT because the defendant did not hold covenant of *all the lands and tenements* that he had leased in D. and because he *did not shew the certainty* of the lands and tenements, therefore writ was abated. Br. Covenant, pl. 8. cites 46 E. 3. 4.

2. So in writ of covenant *to levy a fine*, it shall be of *so many houses*, *so many acres* of land, *so many acres* of meadow &c. Ibid.

3. Covenant was brought, and the writ was *Quod teneat conventionem inter eos factam de omnibus terris & tenementis* which he had in the counties of L. and G. and counted that he covenanted to make him surety of all lands and tenements which he had in the counties aforesaid, and that he prayed him &c. and he would not make it, to the damage &c. and the defendant pleaded to the writ, because it was general *De omnibus terris & tenementis* &c. without certainty, et non allocatur; but the writ awarded good per Judicium, and yet contra 46 E. 3. 4. and also writ of covenant to levy a fine shall be more certain, and the same of præcipe quod reddat; but it was said, that contra here, because it is only to recover damages, and no land. Br. Covenant, pl. 9. cites 47 E. 3. 3.

Br. Vari-
spce, pl. 99.
cites S. C.
—Br. Co-
venant,
pl. 29.
cites S. C.

4. Covenant upon a deed to deliver two pieces of cloth, price 40 s. and the price was omitted in the writ, and yet the writ awarded good; for he may put it in the count, and in covenant he shall recover only damages. Br. Brief, pl. 364. cites 7 E. 4. 25, 26.

5. In pleading to say in such an indenture it is contained so and so, is no direct affirmative that the party did thus and thus covenant and grant, for to say that it is contained in the indenture, and to say that it is covenanted in the indenture, are two things; per Bromley Ch. J. Pl. C. 143. a. b. Trin. 1 Mar. in Case of Browning v. Beston.

6. But if the indenture had been enrolled De verbo in verbum, then it had been sufficient to have said ut supra; for by the enrollment it had appeared to the Justices judicially, and then the saying that it is contained in the indenture is a putting them in remembrance of a thing apparent to them in the record; but as it is here it is no good plea; per Bromley Ch. J. Pl. C. 143. b. Hill. 2 Mar. in Case of Browning v. Beston.

7. Tenant for life made a lease for 15 years, rendering rent to him, or to his heirs or assigns; but there was no express covenant that the lessee should enjoy it during the term; the tenant for life died within the term, and he in remainder entered on the lessee, who thereupon brought an action of covenant against the executor of the tenant for life; but it was adjudged against him upon the insufficiency of his declaration; 1st, Because he had

not

not alleged in fact that he was possessed and afterwards expelled, but only by implication; 2dly, Because the particular *estate with the remainder over* ought to have been certainly alleged, and not with an *Es que &c.* D. 257. pl. 13. Mich. 8. & 9 Eliz.

8. In error of judgment in covenant, it was assigned that the plaintiff declared *Quod cum per scriptum indentatum factum inter eos testatum fuit &c.* and did not allege in fact that he by such an indenture did covenant. It was the opinion of the Court, that the declaration was good, and so are all the precedents, and judgment was affirmed. Cro. E. 195. pl. 12. Mich. 32 & 33 Eliz. B. R. Wilson v. Jeffreys.

In covenant the plaintiff declared that by indenture testatum existit, that he leased a messuage and garden, and

that lessee covenanted not to erect any building in the garden. It was moved that this declaration was not good, because it is that by such indenture testatum existit and does not say expressly that dimisit & covenant, and compared it to the Case of *Brown v. Boston*. Plowd. 141. where it is continetur in tali indentura &c. and 2 E. 4. 21. But all the Court conceived it well enough, and that the usual course in this Court is to declare in this manner, that by such indenture testatum existit &c. Cro. C. 188. pl. 8. Pasch. 6 Car. B. R. Bachelout v. Gage. — Jo. ass. pl. 3. S. C. but S. P. does not appear.

9. Lessee for 21 years covenanted to repair, and leave in repair. Lessor bargained and sold the reversion to A. and B. who bargained and sold to E. who brought covenant against the lessee for not repairing, but in the declaration did not name himself assignee yet adjudged good. Cro. J. 240. pl. 5. Pasch. 8 Jac. B. R. Lord Eure v. Strickland.

Bull. 21. S. C. but S. P. does not appear.

10. Covenant is brought upon an indenture, that where A. had infeoffed B. of certain land that B. should hold it discharged of all dowers; and alleges dower recovered against him; and the Court is quod testatum existit by the said indenture that such feoffment was made, and that the covenant was made ut supra, without a positive affirmation that the covenantor had infeoffed the covenantee, and had covenanted ut supra; the declaration was held good by the words testatum existit; but such words will not serve where a deed is pleaded in bar, nor in a replication. Judged and affirmed in error. Jenk. 331. pl. 63. cites Cro. J. 537. 17 Jac. Bultivant v. Holman.

11. A. leased an advowson to B. for 40 years, B. covenanted that he would not alien without the assent of A. and because he had aliened without assent, A. brought an action of covenant; the defendant pleaded, that he had not aliened without his assent, and found for the plaintiff; it was moved in arrest of judgment, that the plaintiff had not alleged that the alienation was by deed, because an advowson cannot pass without deed; but adjudged for the plaintiff; for it shall therefore be intended, that the alienation was by deed, and so the breach well laid. Winch. 34 Trin. 20 Jac. Anon.

12. In covenant &c. the defendant demurred to the declaration, for that the covenant was, that the plaintiff and his wife should enjoy certain farms &c. and the breach assigned was, that the defendant did enter on the plaintiff; but per Coke Ch. J. it is well enough. 2d, Objection was, that the declaration is, that licet the plaintiff had performed all the covenants on his part

part, the defendant had not performed the covenants on his part: now the (licet) is not good without the word (tamen); for it ought to have been (tamen) the defendant had not performed his covenants, otherwise (licet) is no direct affirmative; Coke Ch. J. thought it would be better with a tamen, but upon the matter it seems good; and judgment for the plaintiff. Roll. Rep. 267. pl. 41. Mich. 13 Jac. B. R. Pemberton v. Platt.

Jo. 305.
pl. 16. S. C.
states it, that
the Baron
died, and
the feme

[441]
and the heir
of the Baron
joined in a
grant to A.
and his
heirs. A.

brought covenant against J. S. and expressed all this in his declaration, and that the defendant had not performed the covenant in repairing the house, which is come to him as assignee of the heir of the baron, without saying that the wife was dead. It was objected that the covenant ought to be as assignee of the feme so long as she lived, and not as assignee of the heir of the baron during her life, and cited Bredon's Case and Treport's Case; but three Justices (absente Richardson Ch. J.) e contra; for they agreed that each passed his own estate to the grantor, and in regard to strangers who may receive prejudice, the feme's estate continues, so that if any rent-charge or other charge was made by the feme, the grantee shall hold it charged during the life of the feme, but in truth the estate of the feme was merged in the reversion in fee, and this is no prejudice to the lessee for years; for he is subject to the covenant, as well after the determination of the feme's estate as in her life; and adjudged that the action was well brought. — S. C. cited Vent. 16c.

2 Keb. 400.
pl. 4. S. C.
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fendant did
covenant;

this with a proferit is good, because when he says, the indenture attests that he did covenant, this is a certain allegation that there was such an indenture; and the indenture is only traversable on the issue non est factum. Gilb. Hist. of C. B. 101.

14. In covenant brought against an executor, the breach assigned was for non-payment of rent; the defendant pleaded plene administravit. After verdict for the plaintiff it was moved in arrest of judgment, that the declaration was ill, for it was (by a certain writing, per quod testatum existit), that the testator covenanted, whereas, the (per quod) should be omitted; for though in covenant (per quoddam scriptum testatum existit) has been allowed to be good, yet it ought to be with such addition, because it is not so precise an affirmation; but the Court thought it to be all of one and the same sense, and therefore good, and judgment for the plaintiff. Sid. 375, 376. pl. 2. Mich. 20 Car. 2. B. R. Stephenson v. Stephenson.

15. Covenant to deliver coals upon request at the port of N. and to put them in such quantities as the plaintiff should appoint, in such vessels as the plaintiff should prepare; and the plaintiff alleges that he did request them &c. at London. The defendant pleaded that he was ready at the day to deliver them. And the plaintiff demurred. And it seemed to the Court that the defendant's

pendant's plea had not been good, but the declaration was naught for want of sufficient averment, for he ought to have averred, that he did appoint the defendant what quantities he should put into such and such vessels as he had prepared, for where the plaintiff is to do the first act, he ought to aver performance, and cited 7 Rep. 10. Sty. 47. Parmeter v. Gressum. Besides, when the thing to be done or delivered is a matter of bulk, there ought to be a certain time agreed, and the party ought to give convenient notice, cites 1 Inst. 210. Semble quod Declaration fuit male. Freem. Rep. 93. pl. 107. Pasch. 1673. Griffith v. Mansell.

16. Covenant &c. the plaintiff declared on an indenture, in which the defendant covenanted, that he was seised in fee &c. and that he would free the lands from all incumbrances, and also for quiet enjoyment; and the breach assigned was upon an entry and eviction by T. S. and concludes *Et sic conventionem suam prædictam fregit*, in the singular number; and upon a demurrer to this declaration it was objected, that the breach did relate to all the three covenants, and therefore the conclusion was ill, because he did not shew what covenant in particular. But it was answered, that *conventio est nomen collectivum*, and if 20 breaches had been assigned, he still counts de placito quod teneat ei conventionem inter eos factam; and of that opinion was the Court, and that the breach being of all three covenants, the recovery in one would be a good bar in any action [442] to be brought afterwards on either of those covenants. 2 Mod. 311. Trin. 30 Car. 2. C. B. After. v. Mazeen.

17. In covenant brought for disturbing the plaintiff in a way, the breach assigned was, that J. S. disturbed but shewed not what title J. S. had, and therefore ill. 3 Lev. 335. Trin. 3 W. & M. in C. B. Holms v. Seller.

18. Where a covenant refers to an estate &c. and is dependant upon it, or waits upon it, and there is no estate granted, the covenant fails; but where the covenant is a distinct, separate, and independant covenant, it is not material whether any estate passed, and that the plaintiff need not shew it, nor say, quod concessit, but the way to declare is with a quod cum testatum existit, but such a covenant subsists with or without the estate. 1 Salk. 199. pl. 5. Mich. 10 W. 3. B. R. Northcote v. Underhill.

they are all void. Lev. 45. Mich. 13 Car. 2. ——— So it is in case of promises. Yelv. 18. Mich. 44 & 45 Elis. B. R. Soprani & Bernardi v. Skurro.

19. Covenant for not repairing brought against an assignee of an assignee; the plaintiff need not set forth the intermediate assignments. 8 Mod. 72. Pasch. 8 Geo. Lovelock v. Sorrel.

(L. a) Assignment of the Breach.

1. **I**N covenant notwithstanding that *diverse covenants are mentioned in the writ*, yet in the count he need not shew the breaking of all. Thel. Dig. 85. Lib. 9. cap. 6. f. 4. cites Hill. 40 E. 3. 5.

2. Covenant by indenture between the lessor and lessee, that the lessor during the lease shall be four days in the year in the house without being ousted in pain of 100*l.* and the lessor comes to enter, and the lessee fastens the doors and the windows, this is no breaking of the covenant without saying that he ousted him; and the same law seems to be of other such like condition. Br. Condition, pl. 35. cites 3 H. 4. 8.

3. D. lessee for years among other covenants, covenanted that he shall not cut any trees, by which they shall be wasted, and was obliged to perform &c. In debt brought upon the obligation, and breach assigned in cutting 20 oaks, the defendant pleaded that he did not cut the said 20 or any of them, modo & forma prout &c. the plaintiff said quod succidit 20 prout &c. The jury found that he had cut 10, yet the plaintiff had judgment; for the covenant is broke if he cut but 10, and the rest is only superfluous. Dy. 115. b. pl. 67. Pasch. 2 & 3 P. & Ms Tirril v. Dun.

4. Lease for years of several messuages dated in November, and to commence at Michaelmas next following, in which the lessee covenanted to repair all the said messuages, except such as the lessor should by writing appoint to be pulled down during the term, and gave bond for performance. In debt on the bond by the lessor, defendant pleaded performance &c. the plaintiff replied, and shewed the breach in not repairing one messuage, parcel of the demised premises, and averred that the said messuage was not appointed to be pulled down during the term, and upon this they were at issue, (viz.) whether the defendant had repaired it or not; and it being found for the plaintiff, it was moved in arrest of judgment, that the averment in the replication was insufficient; for the lease being dated in November, and the term being to commence not before Michaelmas following, the house might be appointed to be pulled down before the commencement of the term, and then the defendant is not bound to repair it; and so the averment does not answer the exception; but after many motions it was resolved by all the Justices that *this averment was superfluous*; for it had been sufficient to have assigned the breach in not repairing the messuage without averring that it was not appointed to be pulled down. And if it had been so appointed, it ought to be shewed on the defendant's part, because it tends to his advantage; for such appointment would discharge the covenant as to that. Le. 17. pl. 21. Pasch. 26 Eliz. Smith v. Peaze.

5. In covenant the plaintiff declared that the defendant by his deed, dated 1 Oct. 28 Eliz. did covenant *that he would use his best endeavours to prove the will of J. S. or otherwise that he would procure letters of administration by which he might lawfully convey such term to the plaintiff, which he had not done, licet scilicet requisitus &c.* The defendant pleaded *that he came to Dr. Drury into the Court of the Archbis, and there offered to prove the will &c. but because the wife of the said J. S. would not swear that it was his will, they could not be received to prove it*; upon demurrer it was insisted for the defendant, that the action did not lie; for the covenant limits no time when the thing should be done by the defendant, so that it being a collateral thing he has time during life, but admitting that he had covenanted to prove the will upon request, then the plaintiff ought to shew an expresse request, and the time and place when and where it was made, because it is for his benefit, and without such a request specially and certainly laid, it was held per tot. Cur. *that the action would not lie*, and that the bar shall not help the insufficiency of the declaration. Le. 124. pl. 170. Trin. 30 Eliz. B. R. Cater v. Booth.

6. In covenant the plaintiff declared, that the defendant assigned to him all the right and interest which he had to the lands in N. lately granted by the Lord D. to one F. for the term of 20 years, and covenanted, that the said premises then were, and *should continue free from all incumbrances and former grants, made by the defendant, and the said F. or either of them, and that the defendant was lawful owner of the said lease, term, and premises, and assigned a breach that F. before the assignment of the term to the plaintiff, had granted two several parts to two persons severally for 20 years &c.* the defendant pleaded, *that F. had granted his interest in the lands, except the lands so severally demised by him.* The plaintiff demurred, the question was, whether by this covenant the defendant shall be intended to be owner of the term only, or of the whole land during the term, and held the word (premises) extends as well to the land, as to the term of years; for it takes in every thing before-mentioned, and which might be incumbered; and this appears more plain by the subsequent words, viz. that the defendant is lawful owner of the lease, demise, term of years, and premises, which word (premises) needed not to be in the deed, if it were intended only, that the term granted should be discharged from incumbrances. And. 236. pl. 253. Trin. 32 Eliz. Andley v. Fiske.

7. Covenant for that the defendant by indenture did covenant *that he, his executors and assigns, would repair a mill let to the defendant, and alledges that the mill was defective on reparations, and the defendant, his executors and assigns, did not repair it*, and it was demurred upon the declaration, because he did not alledge that he nor his executors or assigns did not repair it, the action does not lie, and it ought to be alledged in the disjunctive, and not in the conjunctive, and of that opinion was

the Court. Cro. E. 348. pl. 23. Mich. 36 and 37 Eliz. B. R. Colt v. Howe.

Cro. E. 974;

976. pl. 2.

S. C. ad-

judged ac-

cordingly,

because not

averted that

the reco-

veror enter-

ed upon

good title;

for other-

wise there is no cause of action, and pleading the recovery to be by verdict is not material; be-

cause it may be upon false verdict and without title. — 5 Mod. 371. cites S. C. accord-

ingly. — S. C. cited by Vaughan Ch. J. Vaugh. 122. though the eviction was by course of

law.

*8. An house is leased by the words *grant, demise &c.* and the lessor covenants that the lessee shall enjoy &c. without eviction by the lessor, or any claiming under him, and a bond is given for performance of covenants, the lessee assigns, and in an ejectment the lease is recovered from the assignee; per Cur. the plaintiff (who was the obligee) ought to shew that the recoveror had signs-title; for otherwise the covenant in law was not broken. 4 Rep. 80. Trin. 41 Eliz. Nokes's Case.

9. The covenant was for quiet enjoyment against B. and all claiming under him; the breach assigned was, because he was ousted by J. S. who did claim under B. but did not shew how. But all the court of B. R. held it well enough; for he is a stranger thereto and cannot shew it certainly; and adjudged in B. R. for the plaintiff, but by the opinion of all the justices and Barons, judgment was reversed in the Exchequer Chamber. Cro. E. 823. pl. 22. Pasch. 43 Eliz. White v. Ewer.

10. Apprentice bond was conditioned, 1st, To serve well. 2dly, To account duly. 3dly, To make satisfactions within 3 months after notice, of all losses which he should sustain by the apprenticeship. Defendant pleads performance generally, the plaintiff assigned for breach, because upon account he was found in arrears 60 l. of Polish money, which he received and converted to his own use. And so &c. And though he did not alledge he received it as apprentice, yet it may well be intended, for it is merchandize, and judgment for the plaintiff. Cro. E. 830, 831. pl. 39. Pasch. 43 Eliz. C. B. Cutler v. Brewster.

11. A. leased to J. S. the plaintiff, 35 Eliz. the barton of B. for 6 years, and covenanted that he should enjoy it during the term quietly and without interruption, and discharged from tithes &c. and that if the tithes were demanded and recovered against him during the term, he should recoup in his hands so much of the rent as the tithes amounted to. J. S. brought covenant and assigned the breach, that 42 Eliz. the parson sued him for tithes there growing 38 & 39 Eliz. All the Court held that this suit after the determination of the term was a breach of the covenant, for he did not enjoy it discharged &c. within the intent of the covenant; but because it was alledged that the suit was lawful, or that the tithes were due, for he was not bound to discharge him from illegal suits &c. and so the breach was not well assigned, it was adjudged for the defendant. Cro. E. 916. pl. 7. Hill. 45 Eliz. B. R. Lanning v. Lovering.

Lutw. 457.

Darby v.

Piltarfe.

S. C. and

12. In debt on covenant to pay 100l. quarterly, the plaintiff declared that 100l. for 4 quarterly payments were unpaid, and says not when due and ending it is not good. Show. 8.

Mich.

Mich. 4 Jac. 2. in Cam. Seacc. and so a judgment in B. R. judgment was reversed. *Piltarfe v. Darby.* reversed, because it appeared

by computation that 6 quarterly payments were due when he demanded the 100l. and it is not shewn for what quarterly payments he demanded the said 4 quarterly payments, and it is not sufficient to say that they were due the 23 December before the action brought, for this is true if they were due before.

13. Covenant for that the plaintiff by indenture let to the testator a house in Fleet-street, for years; and the lessee covenanted to repair it well from time to time during the term; and at the end of the term to leave the same well repaired to the lessor; and assigns the breach, for that he did not leave it well repaired at the end of the term. Exception was taken to the declaration, because the breach was assigned in not delivering up the house well repaired at the end of the term, and he does not shew in what part it was not well repaired; sed non allocatur; for the breach being according to the covenant is sufficient. But if the defendant had pleaded, that at the end of the term he delivered it up well repaired; then if the plaintiff will assign any breach, he ought particularly to shew in what point it was not repaired, so as the defendant might give particular answer thereto; and Williams J. said, it was so resolved in a case between BOYLE AND SAXYE, that in a declaration in action of covenant, it suffices to assign the breach as general as the covenant is; wherefore it was adjudged for the plaintiff. Cro. J. 170, 171. pl. 11. Trin. 5 Jac. B. R. Hancock v. Field & al.

S. C. cited Arg. 2 Show. 478. in pl. 439. — Ibid. 460. S. C. cited per Cur.

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14. Where a breach of covenant is sufficiently alledged, the not shewing the breach according to the usual form of *Et sic non tenuit conventionem* is not material, and there need not be a repetition. Cro. J. 297, 298. Hill. 9 Jac. B. R. Barwick v. Gibson, in the Exchequer Chamber.

15. In a covenant were *insensible words*, and though the deed was only between A. of the one part, and B. and J. S. of the other, yet J. S. who was no party, nor sealed the indenture, was named as a covenantor. In assigning the breach the insensible words, and also the name of J. S. may be omitted. Cro. J. 538. pl. 18. Mich. 12 Jac. B. R. Goodman v. Knight.

Roll. Rep. 84. pl. 32. S. C. as to the insensible words.

16. Covenant &c. against the defendant, for ploughing lands which were not nuper laid down to pasture; the question was, what time shall be comprehended by the (nuper) but not resolved; but in some cases 14 years may be nuper, and in some cases 20 years may be said nuper, but all the Court agreed that the plaintiff ought to have shewed a certain breach (viz.) that the defendant had ploughed up lands, and shewed what lands which were not lately arable; and therefore adjudged, quod querens nil capiat per Breve. 2 Bulst. 258. Trin. 12 Jac. Jenner v. Larking.

17. Tenant for life of a park made a lease thereof, with all profits of the deer for 5 years, and the lessee covenanted yearly, and

Popham. 146. Talbot v. Lazen,

S. C. resolved accordingly.

and in quolibet dictorum annorum, to deliver to the lessor so many deer. Breach was, that the lessee had not delivered the number of deer mentioned in the covenant, after the 5 years; but per Curiam, those words, in quolibet dictorum annorum, shall not have relation to the natural life of lessor, but only to the 5 years, and not to the life of the lessor, 2 Roll. Rep. 38. Trin. 16 Jac. B. R. Talbot v. Levison.

In covenant by an apprentice against his master &c. Breach assigned that such a day he departed from his house, and did not in-

18. Covenant whereby the defendant covenanted to find the plaintiff with meat, drink, and apparel, and other necessities, and assigns the breach as general as the covenant, and does not shew what other things were necessary and therefore the Court held, that the declaration was ill, and the judgment being upon nihil dicit, and entire damages given, the judgment was reversed. Cro. J. 486. pl. 5. Trin. 16 Jac. B. R. Mills v. Astell.

fruct his apprentice in his trade, nor find him meat, drink, and other necessities &c. Upon a demurrer, because alia necessaria was too general, the Court held the breach certain in the very words of the covenant, and alia necessaria is intended of small things, as trimming, washing &c. which would be too long to insert, and the plus grand being here particularly assigned, there is no need to assign the small so particularly; and judgment for the plaintiff. 3 Lev. 170. Trin. 36 Car. 2. C. B. Proctor v. Burdett. — 2 Show. 448. pl. 405. Burdet v. Proctor, S. C. and judgment in C. B. affirmed in B. R. — Ibid. 173. cites S. C. — 3 Mod. 69. S. C. and judgment affirmed. — 1 Show. 248, 249. in the case above it is said, that the rule where the covenant is general that the breach may be so too, as in Cro. J. 304. 369. Cro. Eliz. 914. Noy. 50. reaches not this case, those cases being all of covenants to enjoy, and there it lies not in the party's knowledge.

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2 Roll. Rep. 22 Burnell v. Wood, S. C. adjudged accordingly; but if the agreement had been, that it should be first measured, then the mutual agreement of the parties changes the case.

19. Covenant, *whereas he had sold to the defendant all his copyhold land in F. that if it did exceed the quantity of 8 acres, to be admeasured according to the proportion of 16 feet and an half for every pole, that he should pay for every acre over and above the 8 acres so to be admeasured, according to the rate of 4l. for every acre, and alleged that the copyhold land was 12 acres measured by the said measure.* The defendant said, there were not 12 acres measured; but found for the plaintiff; it was said, the breach was not well assigned, because it was not alleged that the lands were admeasured, and till then the surplusage cannot be known; sed non allocatur; for the plaintiff might measure it privately, and he need not tell the defendant when he measured it, and the issue being found that they contained so much, it was holden by the Court the declaration was good. Cro. J. 472. pl. 1. Pasch. 16 Jac. B. R. Burwell v. Wood.

2 Roll. Rep. 144. Presley v. Humfrics, S. C. and it shall be intended that they are in the same place.

20. Covenant, for that he let to M. a water-mill in the parish of S. and all houses, buildings, walls &c. and dams, to the said mill belonging for 21 years, and that he covenanted to repair the houses, dams, water-courses and banks to the mill belonging, and leave them sufficiently repaired &c. and four mill-stones. A breach assigned was in not repairing the mill and mill-banks, and for not leaving the mill-stones; exception was, because not shewed in what vill they were, nor whether it was a corn-mill, or fulling-mill; sed non allocatur; for all is one, the breach being assigned in not repairing &c. And adjudged

judged for the plaintiff. Cro. J. 557. pl. 2. Hill. 17 Jac. B. R. Bressley v. Humphry.

21. Debt for 60l. upon a deed reciting, that whereas W. C. had given divers of his goods to J. A. the testator; he covenanted, that if the said C. should pay a debt of 63l. (for which the said J. A. stood bound in 120l. to pay to one J. S. upon the 2d of June then next following) and should save harmless the said J. A. from the same, and then the plaintiff should have and enjoy concessionem of the said J. A. of the moiety of the said goods; ad quas conventiones performandas he obliged himself by the said writing to the plaintiff in 60l. and alledged in factum that the said W. C. upon the 2 June secundum formam & effectum scripti præd. paid 63l. by which W. C. has saved him harmless from the said 63l. so that he was not damnified, and that neither the said J. A. in his lifetime, nor the said E. his executrix since has made any grant unto him of the moiety of the said goods granted him by the said J. per quod actio accrevit &c. The defendant pleaded, that the said W. C. had not paid the said 63l. &c. Whereupon they were at issue, and verdict and judgment for the plaintiff, and now assigned for error, that there was not a good breach. 1st, Because he does not shew what the goods were whereof the deed of gift was made; sed non allocatur, because the generality is sufficient. 2dly, The allegation is, that he had saved him harmless from the 63l. whereas it ought to have been from the 120l. 3dly, Because he does not shew that he requested a grant of the moiety of the goods, and tendered a writing unto him to seal; for he being the party who is to have the benefit thereof, ought to make the tender; and for these causes, but principally for the second, the judgment was reversed, Cro. J. 661. pl. 10, Hill. 20 Jac. B. R. Archer v. Dalby.

Palm. 278.
S. C. but
S. P. does
not appear,

22. A. confesee of a statute, extends and assigns it to B. and afterwards grants the land to C. and covenants that notwithstanding any act done by him, or any other by his consent, the statute extended, and execution remains in force; adjudged that this assignment was a breach; but reversed in error; for notwithstanding the assignment the statute stands in force, but if the declaration had concluded eo quod concessit to him &c. which implies a covenant, this action had lain; but notwithstanding this assignment, the statute is in force, and the confesee may release it. But if he had covenanted that the grantee should have it without disturbance, this assignment would be a breach by reason of the word (grant) but here the action is brought on a covenant in fact. 2 Roll. Rep. 399. Mich. 21 Jac. B. R. Person v. Jones.

Palm. 388.
Person's
Case, S. C.
according-
ly.

23. Upon a marriage between the son of T. and the daughter of C. it was covenanted, that after the marriage &c. T. should find to his son and wife, and their issues, competent entertainment of meat and drink, and during the life of T. and to live with him in his house, and that if the said T. the son, and his wife, should dislike to live together, that then the son and wife should have such lands and goods of T. the father, and

Lat. 162.
S. C. held
according-
ly, but states
it, that the
wife and
father dis-
agreed, and
the second

husband demanded the land and goods, and for refusal of the father, brought covenant.

— Poph. 204. S. C. states the action as brought by the son's wife and her second

baron, but adjudged that a mutual disagreement between all ought to be alledged, and therefore judgment was quod querens nil capiat; but all agreed that the wife might have boarded with T. the father if she would, but the second husband could not.

a Show. 173. S. C. cited.

* But by the Statute 8 & 9 W. 3. cap. 11. s. 8. it is enacted, that the plaintiff may assign as many breaches as he shall think fit.

live where they please. The son having issue dies. The wife takes a second husband. The wife and T. the father dislike, and disagree &c. And now R. brought covenant upon the indenture for the lands and goods. Whitlock said, that that is a disagreement within the covenant, because it came in lieu of maintainance, Doderidge and Jones on the contrary; for the disagreement between the father and son, in the life of the son, had not been sufficient; but by the Court, that T. ought to find meat and drink &c. to the wife and her issue by the first husband, during the life of T. and judgment was given according to the opinion of Doderidge and Jones. Noy. 86, 87. Hill. 1 Car. B. R. Crabb v. Tooker.

24. S. covenants to surrender her estate for life in a copyhold upon request, and to permit B. to enjoy the same, and to take the rents, issues and profits. In covenant B. assigns a breach, that *she did not suffer him to enjoy the said lands, but had received the rents &c. from the making of the indenture to the time of the writ &c.* Exception was taken, that there was no request as to the permission; sed non allocatur; for the request is only to the surrender. 2dly, That a special disturbance is not alledged. 3dly, The breach is too generally without shewing what profits she received; but the Court conceived, that *in a covenant a man may assign as many breaches as he will, but not* in debt upon an obligation for performance of covenants*, for in that case there ought to be a certainty, and certainly assigned, but in a covenant it may be assigned as general as the covenant is. Cro. C. 176. pl. 23. Mich. 5 Car. R. B. Syms v. Smith.

25. Lessee covenanted to repair the house with convenient, necessary, and tenantable reparations, and the breach assigned was *in not repairing for want of tiles and daubing with mortar, but did not shew that the house was not tenantable*; and the Court were of opinion, that he ought to have shewn it, for there might be a few tiles and a little mortar wanting, and yet the house might have convenient, necessary, and tenantable reparations. Mar. 17. pl. 39. Pasch. 15 Car. 1. Conysby's Case.

26. In covenant against the lessee for years of a house for not repairing, he pleaded that the house was casually burnt down, and upon demurrer it was insisted, that the plea was contrary to what lessee had expressly covenanted to do; and Roll Ch. J. held, that though the house was burnt by negligence, or any other means, the lessee is still bound by his covenant; and judgment nisi for the plaintiff. Sty. 162. Mich. 1649. Compton v. Allen.

27. Covenant in a lease for years was to pay yearly 20l. at Michaelmas and Lady-Day, by equal portions, and the breach assigned was, that he did not pay the rent due at the aforesaid several

several feasts, during the term aforesaid. It was objected, that the breach ought to have been assigned *particularly; but adjudged, that it was well assigned, for perhaps he never paid any rent at any of the days; and so a judgment in Durham was affirmed in error. 1 Lev. 78. Mich. 14 Car. B. R. Coniers v. Smith.

28. In covenant *on a warranty in a fine* the plaintiff declared, *that one S. habens legale jus & titulum did enter upon him, and evict him of a term for years.* Exception was taken, *that this might be by a title derived from the plaintiff himself.* Adjournatur. Mod. 66. pl. 14. Mich. 22 Car. 2. B. R. Wootton v. Heal.

not helped by the verdict, and judgment for the defendant. — Levi. 301. S. C. and judgment accordingly. — Sid. 466. pl. 2. S. C. the plaintiff prayed judgment against himself for his own expedition. — 2 Saund. 177. S. C. adjudged.

29. In debt upon a deed, containing several covenants, for performance whereof the defendant obliged himself in the penalty of 40l. and counts, that the defendant had broke the covenants. Upon non est factum pleaded, the plaintiff had a verdict, and it was moved an arrest of judgment, that the declaration was ill, for there was no *particular breach assigned of any one covenant*; adjudged for the plaintiff; for though this would have been ill upon demurrer, yet here it is cured by the verdict. 1 Vent. 114. 126. Pasch. 23 Car. 2. B. R. Barnard v. Michell.

deed with covenants, and a penalty subsequent on non-performance thereof; adjournatur, — *ibid.* 766. pl. 44. S. C. held and adjudged accordingly.

30. Covenant *that baron and feme should surrender at the next audit at C. and breach assigned that there was an audit 6th of April, and no surrender*; to which the defendant demurred; because this is *not said (the next audit) but being averred that he did not surrender ad prædictum proximum iter, it is well enough*; per Twisden and Rainsford, the rest being absent, and judgment for the plaintiff. 2 Keb. 865. pl. 18. Hill. 23 & 24 Car. 2. B. R. Read v. Jackson.

31. Debt upon a bond for performance of covenants, amongst which one was, *that the defendant should convey such a tenement for the life of the plaintiff, and the life of two others, such as the plaintiff should name, and that he would give him possession before Christmas.* The defendant pleads, *that he always was, and is ready to convey, if the plaintiff would name his lives, but by reason the plaintiff would not name his lives, he could not make his conveyance.* Upon this plea the plaintiff demurs, and shews for cause, because the defendant had *not alledged that he gave him possession before Christmas, and that he might have done, though he could not convey till the plaintiff had named*; sed per Cur. Judgment was given for defendant, because *the possession shall not be intended a divided thing, but a possession pursuant to the lease that he was to make*; for otherwise

the possession given would be an act done to no purpose, for he might turn him out again presently; adjudged for defendant. Freem. Rep. 121. pl. 142. Trin. 1673. in C. B. Twyford v. Buntley.

Vent. 175.
S. C. but
S. P. does
not appear.

— 2 Lev.
26. S. C.
but S. P.
does not
appear.—
3 Keb. 193.
pl. 38. S. C.
adjudged.

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32. Covenant for quiet enjoyment against all persons claiming under Sir P. V. and *shews that such a one did disturb him, clamans titulum under Sir P. V.* and the defendant demurred, because he did not say *legalem titulum*; and for that the Court took this difference, that *where a man makes a general covenant against all persons, there a breach of covenant shall not be alledged by a disturbance, unless it be by a lawful disturbance*; but otherwise it is when the covenant is to enjoy quietly against a particular person, according to the difference taken in Case of TIDSDALE v. ESSER in Hob. 34. And the Court said generally in covenant it is sufficient to follow the words of the covenant. Freem. Rep. 103. pl. 121. Pasch. 1673. Lucy v. Leviston.

33. *A. and B. were bound in a bond to C. for the payment of 20l. at a certain day. A. covenants with B. to save him harmless from the said bond. B. brings an action of covenant, and alledges for breach that C. sued him in the Exchequer upon the said bond, and had judgment against him, but he does not alledge that A. did not pay the money at the day.* It was urged for the defendant, that for all appears, the money might be paid at the day, and then, though C. did sue B. and recover, yet it was no breach of the covenant, because the suit was tortious, and the covenant shall not be extended to save harmless from wrongs, and therefore he ought to have averred that the money was not paid at the day; but on the other side it was said, that there is a great difference between a general covenant to save harmless (for that shall be intended only against lawful wrongs), and to save harmless against a particular person, for that is against tortious as well as rightful acts, cites Hob. 35. Besides, it cannot be intended that the money was paid when it is set forth that C. sued and recovered; but Vaughan Ch. J. said, the books did generally make a difference between a general saving harmless, and when it is against a particular person, but he did conceive there was none at all; for the reason was the same in both, which is, when a man is wronged the law gives him his remedy, which holds as well against every body as against a particular person; but the other Judges were of a contrary opinion, and gave judgment pro quer. Vaughan being gone into parliament. Freem. Rep. 142, 143. pl. 163. Hill. 1673. Hill v. Browne.

3 Keb. 142.
pl. 14. S. C.
adjournatur.
— S. C.
cited Id.
Raym. Rep.
107. per
Tieby Ch. J.

34. Covenant, in which the plaintiff declared, that the defendant covenanted to build him an house according to the rules prescribed per statutum, for rebuilding London, and assigned the breach, that he did not cover the cantilivers with lead, according to the rules prescribed per statutum præd. there was judgment by default, and a writ of enquiry, and 15l. damages. It was moved in arrest, that the breach was not sufficiently assigned,

figured; he *not alledging in fact, that by the act the cantilivers ought to be covered with lead; but per Hale*, it being said that he did not cover them with lead *secundum regulas per prædict. statutum præscriptas* is an averment, that the statute so prescribed. 2 Lev. 85. Pasch. 25 Car. 2. B. R. Dixe v. Jenman.

35. In covenant on a bill of sale, *that the defendant was the legal proprietor of W. sold, and had power; the plaintiff alledges breach, that he was not proprietor, and does not say Et sic non tenuit conventionem, sed infregit*; the defendant *pleads tenuit conventionem*; to which the plaintiff demurred; and per Cur. the breach is sufficient, and the *et sic infregit* is but form, and well enough beside; judgment for the plaintiff. 3 Keb. 396. pl. 97. Mich. 26 Car. 2. B. R. Streeting v. Hinde.

36. In covenant for not repairing a house let in S. being in decay, not said wherein, to which the defendant demurred, and shewed for cause, that it was not particularly set forth wherein it was in decay, which per Cur. is ill, as well as in waste; and judgment for the defendant, if parties do not agree to amend. 3 Keb. 478. pl. 11. Trin. 27 Car. 2. B. R. Portland (Countess of) v. Andrews.

37. A. granted a rent-charge of 200l. to B. and C. their heirs, for the life of M. *ad opus & usum of M.* and covenanted to pay the rent *ad opus & usum of M.* The rent not being paid, B. and C. bring covenant, and assign the breach *in not paying the rent to themselves ad opus & usum of the said M.* The defendant demurred, because the words in which the breach is assigned contains a negative pregnant; but it being assigned in the words of the covenant, the Court held it good. Mod. 223. pl. 12. Mich. 28 Car. 2. C. B. Balcawen v. Cooke.

2 Mod. 138.
Cook v.
Herle, S. C.
& S. P.
agreed accordingly,
and that if
the rent had
been paid to
M. the defendant
might have
pleaded it,
that being a

performance in substance, but it shall not be intended without pleading it, and judgment for the plaintiff.

38. Covenant *that the plaintiff should have the first quarter's rent due at Lady-Day, after the date of the deed; breach assigned, that the defendant obstruxit & impedivit eum (the plaintiff) a recipiendo &c.* It was moved in arrest of judgment, because the plaintiff shews not how he was hindered, and cited 1 Bulst. 139 3 Cro. 121. PEN v. CLOVER. But it was answered and confessed, that non permittit is too general, for there is no act done, but by impedivit & obstruxit it is clear some act was done to the plaintiff's hindrance, which act the defendant best knows himself; adjournatur. 2 Show. 75. pl. 58. Trin. 31 Car. 2. B. R. Prescott v. Pemberton.

39. Covenant for payment of rent which was reserved payable at the 2 most usual feasts of the year, St. John the Baptist and Christmas, or within 14 days after, the first payment to be at Christmas next after the date. Breach assigned in non-payment of the rent at Christmas first, and took no notice of the 14th day after; and upon demurrer it was urged, that the 14 days after

after should not refer to the first payment at Christmas, but that it was to be absolutely on Christmas Day; but held by the Court, that the defendant had 14 days after the first Christmas as well as any other to pay his rent in; and therefore judgment was given for the defendant. 2 Show. 77. Trin. 31 Car. 2. Anon.

40. Plaintiff declared of a covenant to repair all the pales of the garden demised, except all the pales of the west side, and assigned the breach in not repairing the pales contra formam conventionis, without shewing that the default was in the pales not excepted. Defendant pleaded that he had repaired the pales according to the covenant, Verdict for the plaintiff, and judgment accordingly by reason of the verdict; but it was agreed, that if the defendant had demurred, judgment ought to have been for him. 2 Jo. 125, 126. Hill, 31 & 32 Car. 2. B. R. Anon.

2 Show.
36. pl. 159.
S. C. but
S. P. does
not appear.

41. A breach may be well assigned though not directly within the words of the covenant; as where in a charter-party it was mutually covenanted, that the master of the ship (who was the plaintiff) should pay two parts of the port-charges, and the factor of the defendant the 3d part, through the whole voyage. The master declares, that he sailed from L. to C. and paid 2 parts of the port-charges for himself, and the 3d part for the defendant, who not repaid him. After judgment by default, and a writ of enquiry returned, it was objected, that the defendant was not bound by this covenant to pay the 3d part to the plaintiff, but to the collector of the port-charges, and therefore he ought to have shewn, that the defendant had not paid the 3d part; sed per Curiam, the plaintiff having averred, that he paid the 3d part, it shall be intended, that the defendant did not, and in his default the plaintiff was forced to pay the whole to prevent the ship's being stopped in the port; and though it was not said, that they were paid in this voyage, yet it shall be intended so to be, it being alledged to be paid in the same ports where the voyage was said to be made. 2 Jo. 186. Hill, 33 & 34 Car. 2. B. R. Bellamy v. Ruffell.

42. Covenant with a brewer for grains; the brewer mixes bops with the grains and spoils them; covenant lies though he declares specially. 2 Jo. 191, 192. Pasch. 34 Car. 2. B. R. Goodhand v. Griffith.

2 Show.
248. pl. 251.
S. C. the
Court
thought the
declaration
ill, because
altogether
informal;
but the ex-
ception on
which they

43. Covenant brought on articles indented, and in the memorandum it was, *De placito conventionis fracti*, but the declaration was, as it is in *action sur le case, quod cum per factum indentatum testatur; quod defendens concessit, and concludes non prout solet in covenant, et sic infregit conventionem*. After a breach assigned, and a demurrer, the Court was of opinion, that this is an action of covenant, and that it is not necessary to conclude *Et sic infregit*, nor usual in pleading to say *De placito quod teneat conventionem*; but the covenant being that the defendant non relaxa et a debt assigned to the plaintiff without his

his leave, the Court was of opinion, that the breach was not well assigned; and gave judgment quod querens nil capiat per billam. 2 Jo. 229. Mich. 34 Car. 2. Copping v. Slaymaker.

adjudged the declaration naught, was because the covenant

was, that he should not alien without licence, and the breach was, that he made a lease contra formam & effectum conventionis prædictæ, and does not say absque licentia; held naught, and judgment for the defendant. — Skinn. 120. pl. 15. S. C. that the plaintiff not alledging the release to be without his assent, for doubt appears it may be with it, and so no breach of covenants. — 2 Show. 309. pl. 319. S. C. but S. P. does not appear.

44. Covenant &c. upon a lease, wherein the defendant covenanted to *repair the buildings with all needful reparations, principal timber only excepted*; and the breach assigned was, *and that after the demise 2 barns, parcel of the tenement demised, were in decay for want of thatching and walling, and not for want of principal timber*. The defendant protestando that the barns were not in decay, pleads that he was ready to repair &c. where necessary (principal timber only excepted), but there was a necessity of two principal beams of timber to support the said barns, of which the plaintiff had notice, but refused to deliver them; and upon a demurrer to this plea the plaintiff had judgment, because the defendant gave no answer to the breach particularly alledged by the plaintiff, that the barns were in decay for want of thatching and walling, and not for want of timber. 3 Nels. Ab. 122. pl. 3. [Mich. 3 Jac. 2.] cites Lutw. 308. Brailford v. Parsons.

45. Covenant &c. on a lease of an house for years, wherein the defendant covenanted to *repair it at his own charge, and all aqueducts, bridges, and fences &c. with banking, cleansing, and fencing &c. during the term*; the breach assigned was, *that the house and 20 perches of bank, 10 bridges, and 40 perches of fence were broken, pulled up, broke down and spoiled*. Exception was taken to this declaration, that the breach assigned so generally was not good; but adjudged that the declaration was good, the breach being assigned according to the words of the covenant. 1 Lutw. 326. Hill. 3 & 4 Jac. 2. B. R. Lee v. Johnson.

46. A. covenanted with B. to obtain a grant of lands from C. A. is bound though C. has no title. Comb. 172. Mich. 1 W. & M. in B. R. Scounden v. Hawley.

47. Covenant to permit the defendant to carry away trees; breach quod non permittit, sed obstruxit & obstupavit; held well upon demurrer, and judgment for the plaintiff. 1 Show. 252. Hill. 2 W. & M. Dye v. Wells.

48. Breach of covenant may be well assigned in the words of the indenture, though they are disjunctive words in the covenant. Carth. 124. Pasch. 2 W. & M. in B. R. Rawlins v. Vincent.

49. Covenant to keep in good repair the house, out-houses, and stables; and the breach assigned was, that the defendant had permitted the racks in the stable to be in decay. After verdict it was moved, that the plaintiff should have set forth, that the racks

racks were fixed in the stable, and so part of the freehold, for they might be in the stable and lay loose, and Pollexfen Ch. J. was of that opinion; but the other Justices conceived, that it should be intended that they were fixed for use there, and it would be very remote to give it any other construction; and so judgment was given for the plaintiff. 2 Vent. 214. Mich. 2 W. & M. in C. B. Anon.

50. In covenant &c. the plaintiff declared, that the defendant had covenanted for herself, her executors, administrators, and assigns, that she would permit the plaintiff to make a drain &c. and the breach assigned was, that she assigned the lands where the drain should be made to one T. who would not permit the plaintiff to make the drain; there was a plea, and replication, and demurrer; and it was objected against this declaration that it was ill, because the covenant was for the defendant &c. or her assigns, to permit &c. and the breach is laid in the assignee's not permitting, and it appears by the pleading that the assignment made to T. was diverse years before the demise made to the plaintiff, and this covenant cannot extend but only to the assigns of the defendant after the lease made. Besides, to say non permittit, without shewing some special disturbance, and which ought to have been particularly set forth, that the Court may judge of it, is ill; and judgment accordingly. 2 Vent. 278. Hill. 2 & 3 W. & M. in C. B. Targett v. Lloyd.

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1 Salk. 106, 197. pl. 2. S. C. the exception taken to the assignment of the breach in not shewing a disturbance or other special damnification, without which the rent being behind is no breach, was taken by the Court, and they took, this diversity, where the counter-bond or covenant is given to save harmless from a penal bond be-

51. *Covenant by the assignee of a term against the first lessee, in which he covenants, that the plaintiff shall enjoy free and clear of all incumbrances, and saved harmless and indemnified from all arrears of rent, and assigns for breach, that 64 l. rent was arrear, and that he desired the defendant to pay it, but he did not do it; the defendant pleads, that as to 60 l. part of the said 64 l. that he had left it in the hands of the plaintiff, ea intentione that the plaintiff should pay it to the lessor, and as to the 4 l. residue of it, that he had paid it himself to the lessor &c. to which the plaintiff demurred, because ea intentione ad solvendum is uncertain; for his intention is not a thing issuable; sed non allocatur; for he might reply, Non reliquit modo et forma, and thereupon issue might be joined, and upon this issue he might give in evidence any matter to prove his intention; and it was excepted to the declaration, because no damnification is shewn, for it is not like to a condition of a bond broken, for there is a damage immediately by the parties being subject to the penalty, but it is otherwise here, till an action brought, or distress taken, or other damages accrued; and Roll. Tit. Condition, Cooper and Pollard 433. was cited, which was the same case in effect; and another case lately adjudged upon the same reason. Skin. 397. pl. 31. Mich. 5 W. & M. in B. R. Griffin v. Harrison.*

fore the condition broken, there if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and is damaged; but if the counter-bond be given after the condition of the obligation is broken,

or to save harmless from a single bill without a penalty, there the counter-bond cannot be sued without a special damnification. — 4 Mod. 249. S. C. accordingly.

52. The plaintiff declared, that the defendant covenanted to pay yearly during the plaintiff's life at the two feasts of Michaelmas and Lady-Day 3l. 6s. 8d. by equal portions; and assigned for breach, that 3l. 6s. 8d. for a year at Lady-Day last was in arrear and unpaid; the defendant demurred and objected, that it does not appear when the money became due; for it might be behind and unpaid at Lady-Day, and yet might become due at Michaelmas or Lady-Day before; but the Court held this well enough upon a general demurrer, and gave judgment for the plaintiff. 1 Salk. 139. pl. 3. Trin. 6 W. & M. in B. R. Stagg v. Hind.

53. Debt upon articles of agreement, by which the defendant was to tender a conveyance to the plaintiff, his heirs, or assigns; and the breach assigned was, that the defendant did not tender a conveyance to the plaintiff; and it was objected, that this breach was not pursuant to the covenant by which he is to tender to the plaintiff or his assigns. But per Cur. the difference is between doing a thing to a man or his assigns, and by a man or his assigns. In the last case the breach must be in the disjunctive, that it was not done by him or his assigns, but in the first case it is sufficient to say, that it was done to him; for an assignment shall be intended to be done to the plaintiff himself, and if he assigns his interest then to the assignee, and if he did assign his interest that ought to be shewed on the side; and so a judgment in C. B. was affirmed. 1 Salk. 139. pl. 4. Mich. 7 W. 3. B. R. Smith v. Sharp. [453]

54. In an action of covenant the breach may be assigned as large as the covenant is, for all is recoverable in damages, and those damages shall be for the real damages which the party can prove that he has actually sustained. But in debt upon a bond conditioned to perform covenants in a certain indenture specified, there a precise breach must be shewn, because a breach is forfeiture of the whole bond; per Cur. Lord Raym. Rep. 107. Mich. 8 W. 3. in Case of Brigstock v. Stannion.

5 Mod. 133. S. C. adjudged, and same diversity taken. — 12 Mod. 86. S. C. and same diversity. It was held per Cur. that upon a bond to perform covenants you must assign but one breach; but in an action of covenant as many as

you will. Freem. Rep. 157. pl. 174. Falch. 1674. in C. B. in Case of King v. Gogle.

55. 8 & 9 W. 3. cap. 11. s. 8. Enacts, that in all actions in any of his majesty's courts of record, upon any bond, or on any penal sum, for non-performance of covenants, the plaintiff may assign as many breaches as he shall think fit, and the jury upon trial of such action shall assess, not only such damages and costs as have been usually done, but also damages for such of the said breaches as the plaintiff shall prove, and like judgment shall be entered on such verdict as hath been usually done in such actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or nihil dicit, the plaintiff upon the roll may suggest as many breaches as he shall think fit, upon which shall issue a writ to the sheriff, to summon a jury to appear before the Justices of Assize, or Nisi

Nisi Prius, to enquire of the truth of those breaches, and to assess the damages.

56. By the 8 & 9 W. 3. cap. 10. and 4 & 5 Anna, cap. 16. the plaintiff may assign as many breaches as he pleases on bond to perform covenants &c.

57. Covenant was brought on a penalty of certain articles, wherein the defendant had agreed to pay so much per chaldron for all coals laden either at Newcastle or in the River Tyne, and brought to London; the breach assigned was, that the coals were laden on such a ship *infra portum de Tinmouth* (viz.), at North-Shields, and brought from thence to London. The defendant demurred, because it did not appear that Tinmouth is upon the River Tyne, and so the breach not well assigned, and the Court cannot take notice of it judicially, and therefore inclined against the plaintiff, but gave leave to discontinue on payment of costs. 5 Mod. 352. Trin. 9 W. 3. Toddard v. Middleton.

58. Defendant covenanted with the plaintiff, that he would pay him 100l. in money, and give him credit for 100l. more, upon the plaintiff's assigning him 1000l. stock in the bank of England, and that the defendant would accept the same upon notice on or before 24th of May next following. In covenant plaintiff alledged notice to defendant, that plaintiff would be ready to make the transfer on the said 24th of May, but the defendant did not come to accept, and non-payment of money assigned for breach &c. And per Cur. the breach is ill assigned, for they should assign for breach, that they had tendered a transfer, and that defendant did not accept, for there was nothing to be paid but after transfer. 12 Mod. 248. Mich. 10 W. 3. Shales v. Seignoret.

59. In debt on bond to perform in covenants, the replication must shew a certain breach; but in covenant it is enough to assign a general breach; per Holt Ch. J. 1 Salk. 140. pl. 5. Trin. 11 W. 3. B. R.

60. Apprentice covenanted with his master not to buy or sell without the master's leave, within two years; in covenant the breach assigned was, that the defendant *diversis diebus & vicibus, between such a day and such a day, sold to H. and other persons unknown, goods to the value of 100l.* After verdict for the plaintiff it was moved in arrest of judgment, that the breach was uncertain, both as to times and persons; but per Holt it is certain enough; for it is so described, that if another action be brought the defendant may plead a former recovery for the same cause, and aver this to be the same selling; to which Gould J. agreed, and that the action here being only for damages it is well enough; and judgment for the plaintiff. 1 Salk. 139. pl. 5. Trin. 11 W. 3. B. R. Farrow v. Chevalier.

61. Covenant to grind all his corn which he should use in his house at plaintiff's mill; breach assigned, that there were 500 barrels of wheat ground and used in defendant's house which he did not grind at plaintiff's mill; but ill, it not being said

it

Ld. Raym.
Rep. 107,
108. S. P.
by Treby
Ch. J.

Ld. Raym.
Rep. 478.
S. C. and
says, that
another
breach was
[454]
laid for
having
bought
goods in
the same
manner;
and ad-
judged ac-
cordingly.

it was his corn. 12 Mod. 327. Mich. 11 W. 3. Hamley v. Hendon.

62. Assumpsit to deliver corn on or before the 5th of January into a barge to be brought by the plaintiff to receive the said corn. The breach assigned was, that he *did not deliver on* the 5th of January; it is good without a verdict, because there must be a concurrence of both parties; per Holt. 1 Salk. 140. pl. 6. Mich. 12 W. 3. B. R. Harmon v. Owden.

Ld. Raym. Rep. 620. S. C. & S. P. per Holt, as to its being without a verdict; but however, it is

aided by the verdict, and judgment for the plaintiff.

63. In covenant for not repairing the *heir assigns breach* that the premises were out of repair, *tali die & per decem annos ante tunc, which included his ancestors time*, and held good. 1 Salk. 141. Pasch. 4 Ann. B. R. Vivian v. Campion.

a Lord Raym. Rep. 1195. S. C. and held that the breach is certainly and well enough assigned.

64. A covenant was, *that the defendant should dance, sing, and act under the society of comedians, and obey orders; and should act and be assisting to no other theatre, but what was appointed by R.* and the breach assigned was, *that he acted at Oxford, without the consent of the plaintiff.* The defendant demurs to the declaration; and Pengelly excepted to the defendant excepted to the declaration. 1st, That it is *set out with post hęc &c.* which must be construed from the filing of the declaration (or bringing the writ), and it should have been *post confectiorem indenturę, i. e.* That he the said W. did covenant that he, for five years after the making, would not act &c. 2dly, This breach is not well assigned; because it does *not appear that the play he acted was publick*, and if not so it was no damage to the plaintiff, and the design of the covenant was not to restrain any dancing, acting &c. unless where it drew others (to lay out their money at other play-houses) from the play-house of R. Salkeld contra that this breach is well assigned according to the covenant, and it is not material whether the acting were for gain or not, but take it to be for no gain, it is yet prejudicial to the plaintiff, for nobody will see his play when they can see another for nothing. Holt and Powell held, that *quod post hęc non ageret &c.* in the declaration should have been *quod abinde non ageret &c.* now *post hęc was right in the recital of the covenant, but wrong in the declaration; because post hęc must be taken to be after the present time; so that the breach is laid to be after the declaration.* But it was adjourned, though the Court thought it could not be made good. 11 Mod. 133. pl. 13. Trin. 6 Ann. B. R. Rich v. Wilks.

65. Covenant to leave the premises in good repair at the end of the term &c. breach assigned, *that by one month before the end of the term they were not in repair in any part thereof, contrary to the form and effect of the covenant; exception was for that they ought to have said that the defendant did not leave that in good repair at the end of the term, sed non allocatur.* Trin. 10 Ann. B. R. Hamond v. Royston.

66. Covenant

66. Covenant by lessor with his lessee, *that he should repair the premises demised before Michaelmas next, Breach assigned by lessee, the 28th September the premises were out of repair to be done by the lessor according to the covenants contained in the deed.* On demurrer to the declaration, judgment was for the defendant, for this is altogether uncertain, and it is but argumentation, that the lessor had not repaired; the breach should be assigned in the words of the covenant, that he did not repair. There is a difference between a covenant executory and one not, and saying (according to the covenant) is uncertain. Pasch. 10 Ann. B. R. Mitchel v. Hamond.

67. A lessee for years covenants *that it shall be lawful for W. and two others his lessors, their executors, administrators, or assigns, or any of them with workmen, and other company, to enter and view the premises if in repair &c. W. brings covenant and assigned a breach, that he with workmen came to the defendant's house such a day, and at such an hour, and requested him that they might enter, and that the defendant recusavit & non permisit, and that W. and the two other lessors came the day and hour to the defendant's house, and requested, and defendant recusavit &c. without saying postea scilt. &c. Defendant pleads to the whole, and says he did not refuse the plaintiff to enter, but answers nothing as to the 2d breach assigned &c. Sed per Cur. It is a good plea; for the two assignments in the declaration are but one breach, it being all said to be at the same time and hour, for all three might come together and request, and not W. first, and then he and the other two afterwards &c. Mich. 10 Ann. B. R. Wright v. Nicholls.*

68. In assigning of a breach *if there be a varying between the assignment and the words of the covenant, such a fact must be assigned, as is a breach in law of the covenant; per Parker C. J. Pasch. 11 Ann. B. R.*

Per Eyre J. the plaintiff should have said that defendant did not do it during the term; for the breach ought to be assigned in the words

of the covenant; and Per Parker Ch. J. he should have said that defendant did not lime them at all, and that the closets remained unlimed during the residue of the term; that where a man is to do one particular act during the term, and which is not an act of continuance, once doing it within the term is well enough. MSS. Rep. S. C.

69. Lessee covenanted to lime and dung the land durante termino, lessor died within the term, and his heir brought covenant and assigned the breach, that after the descent of the land the defendant did not durante termino lime and dung the land. The Court held the breach not well assigned; because the not dunging it and liming it since the descent is no breach of the covenant, if it was limed and dunged so sufficiently before, that it did not need it. Adjournatur. 10 Mod. 158. Pasch. 12 Ann. B. R. Sail v. Kitchingham.

70. In covenant the plaintiff declares that he the plaintiff, did covenant with the defendant *to transfer at a certain day, such a share of stock, with the dividends and profits that in the mean time should arise upon the same to the defendant at the South Sea House, at the usual hours, when the books of the company are open, and*

and that the defendant did covenant to accept the same, and pay so much to the plaintiff for it, provided the plaintiff did tender it at the time and place above-mentioned; and he avers that he was at the South Sea House at the day, at the usual hours when the books are open, to tender the said share of stock, with the dividends and profits of the same to the defendant; but that the defendant did not accept the same, sed penitus recusavit & adhuc recusat acceptare &c. The defendant demurs specially. Per Cur. the plaintiff has not entitled himself to his action, for that he has not shewed what are the usual hours of keeping the books open, and that he was at the place a convenient time before shutting the books, ready to make a tender; and the refusal being not expressly laid to be at the time and place, shall not be so intended; if it had been so laid, it would have been good. Gibb. 61, 62, 63. pl. 9. Pasch. 2 Geo. B. R. Bowles v. Markwith. [456]

71. Where the covenant was that lessee should quietly enjoy two closes *against all claiming or pretending to claim any right in them*, he had assigned the breach thus *that J. S. having or pretending to have a claim time out of mind did enter upon the said closes*, and held well assigned, and that this case differed from the Case of Kerby v. Hanfaker, for it is impossible here that the disturber could claim under the plaintiff himself, by reason of the words *time out of mind*. 10 Mod. 383, 384. Hill. 3 Geo. 1. B. R. Chaplain v. Southgate.

(M. a) Pleadings and Assignments of the Breach. Joint and Several.

1. TWO made indentures between them *quod cum uterque obligatus fuit alteri in two single obligations they covenanted between them quod si uterque eorum steterit et obedierit arbitrio et ordinationi A. et B. &c.* that then the obligation of him who shall be void and the obligation of him who shall not perform it shall be in force, and therefore per Littleton each has bound himself as well for his companion that he shall perform the award, as that he himself shall perform it, and the defendant pleaded performance and did not say that the plaintiff had performed also and yet good per tot. Cur. For it shall be intended that each shall perform his own part, for these words *quod uterque steterit* is as much as if he had said *quod uterque eorum pro parte sua steterit* for it is no more but every one for his own part, and these words *quod uterque obligatus alteri in 100l.* is good also, and shall not be taken by this, that both of them are bound to each of them, but shall be taken, *quod uterque pro se teneatur alteri separaliter*. Br. Covenant pl. 27, cites 39 H. 6. 9.

2. And also in indentures they say in the end, *ad quas quidem conventiones perimplendas uterque teneatur alteri in 100l.* this is good and every one by himself separately is bound to the other; for those words are good several words in themselves.

And so see that those short words are several in themselves as well as if each severally by two covenants had covenanted with the other. Quod nota, per Cur. Ibid.

9 Le. 160.
pl. 809.
C. B. Beck-
with's Case,
adjudged
for the
plaintiff;
but reversed
in error in
Cam. Scacc.
the action
in C. B. be-
ing brought
by one of
the cove-
nantees and
adjudged
there for the plain-
tiff. —

2 Le. 47.
pl. 60.

Anon. S. C. in the Exchequer, and adjudged there by the whole Court, that covenant did not lie by one of them only but ought to be brought by all. — S. C. cited by Coke Ch. J. 3 Bull. 68. — S. C. cited by Fleming Ch. J. Bull. 26.

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Cro. E. 408.
pl. 26. Mat-
thewson v.
Lydiat S. C.
adjournatur.
— Ibid.
470. pl. 22.
S. C. but
not resolved
the Court
differing in
opinion,
and there-
fore moved
the parties
to com-
pound. —
Ibid. 546.
S. C. ad-
judged that
it is several.

— S. C. cited per Williams J. Bull. 26. to be adjudged that the word (Separatim) makes the same to be several covenants, and not joint.

Carth. 97.
S. C. ac-
cordingly.
— Comb.
163. S. C.
— Show.
79. S. C.

Ibid. 207.
S. C. cited
by Harvey

3. R. B. by deed covenants with 4 persons and their assigns &c. *ad & cum quolibet eorum*, that he was lawfully and solely seised of a rectory. Two of the covenantees bring covenant against R. B. and held ill, because it was a joint covenant and the others ought to have joined. Where it appears that every of the covenantees hath a several interest or estate, the covenant shall be several in respect of their several interests; and if covenant be with the covenantees et cum quolibet eorum, these words make the covenant several, as if a man demise black acre to A. and white acre to B. and covenants with them et quolibet eorum &c. the covenant is several but if the demise had been to them jointly, the words cum quolibet eorum are void; for a man by his covenant in respect of several interest cannot make it first joint, and then several by the words cum quolibet eorum. 5 Rep. 18. b. 19. a. Mich. 29 & 30 Eliz. in Cam. Scacc. Slingsby's Case,

4. One Lydiat and 6 other merchants covenant separatim with the master and owners of a ship by a charter-party, that one shall pay so much, another so much &c. for carrying of goods, and the master and owners covenanted with the merchants to ship certain merchandizes to such a port &c. Held that though the merchants join in the covenant (id est) convenient separatim, yet this word separatim makes this several covenants and not a joint covenant, and whereas it was further added, *performationem omnium & singularum conventionum quilibet mercator separatim obligat seipsum* &c. in double the freight. This is several too by reason of the word separatim, and this word shall refer to the several covenants before, and when covenants are several they are as several deeds, and the covenant here on the part of the master and owners is joint. 5 Rep. 22, 23. Hill. 39 Eliz. C. B. Mathewson's Case.

5. The plaintiff declared that A. and B. dimiserunt; this imports a joint covenant as to the interest granted, but as to acts subsequent it imports a several covenant. 1 Salk. 137. Mich. 1 W. & M. in B. R. Coleman v. Sherwin.

6. If A. conveys 3 manors to B. C. and D. severally, and covenants with them & quolibet eorum, that he has conveyed to them a good estate; these are several covenants and not a joint covenant. Jenk. 262. pl. 63.

7. E. seised in fee of a manor conveyed it to the use of himself for life, and then to his wife till T. his son should be 24; and died,

7. *T. granted a rent-charge to N. and covenanted that he had not altered any estate made by his father, and had done no act whereby it should be altered, and that the land should be open to the distress of N.* Adjudged that there were several covenants; for the two first were negative, and the last affirmative. Litt. Rep. 63. Arg. cites Mich. 1 Jac. C. B. Ersfield v. Napper.

J. that T. recited that he was seised of such estate as E. his father had conveyed to him, and says,

that this grant was before T. was 24, and that T. covenanted that he had good and lawful power to grant notwithstanding any act done by him, and that the land charged shall be open and sufficient to his distress; and for that the land was not open to the distress, action was brought; that T. pleaded that he had done no act, but that the land should be open, and adjudged against him, that the words (notwithstanding any act &c.) do not extend to this last covenant as to the land's being open, which is absolutely of itself.

8. *The plaintiff had a reversion of two houses, one in fee, and the other for years, and makes a lease for years, with covenant [* by the lessee] for reparations of both houses; and question was, whether the plaintiff should have one action, or several actions, and adjudged that he should have a joint action for both.* Brownl. 20. Mich. 7 Jac. Pyot v. Ld. St. John.

* 2 Bulst. 102. St. John v. Fox, S. C. in B. R. and judgment in C. B. affirmed.

9. *Indenture of covenant between A. and B. of the one part, and C. of the other part. Among other covenants one was, it is agreed between the parties, that C. enter into bond to pay A. 160*l.* by such a day, which was not paid. A. dies. B. and not the administrator of A. shall have the action on this covenant; for the 160*l.* payable to A. in his life being to be obtained by his suit on this indenture, no one can have action upon it, but those who are parties during their lives, and after their death the executor or administrator of the survivor.* Yelv. 177. Trin 8 Jac. B. R. Rolls v. Yate.

2 Brownl. 207. Yates v. Rolls, S. C. adjudged; for it is a joint covenant. — Bulst. 259. 26. S. C. held accordingly, and so judgment in C. B.

affirmed. And per Fleming Ch. J. where there is matter precedent, and apt words to draw several considerations, as in * MATTHEWSON'S CASE before, there several actions of covenant are to be brought; but otherwise it is where no such matter appears, as in this principal case, and therefore the covenant here being joint, the plaintiffs ought to join in the action of covenant, and so the judgment well given for them, and to be affirmed. Fenner J. said, that if a man be bound to three, solvendum to one of them, this is joint, and they ought all of them to join in the action, and so in the principal case here.

* See pl. 4.

10. *Covenant against B. and C. on a covenant in an indenture artificially to erect an house &c. Judgment was against B. by default. C. pleaded that he and B. had artificially erected &c. and so to issue, and found for C. A writ to enquire of damages was moved for against B. because the act to be done was to be done by both, and B. is condemned of non-feasance by the Judgment; but the Court denied it, and held that B. should not be charged with any damages; for it appears that the covenant is performed, and C. shall have costs against the plaintiff.* Sid. 76. Pasch. 14 Car. 2. B. R. Boulter v. Ford.

Keib. 284. pl. 91. S. C. adjudged for the defendant.

11. And Windham J. held, that if C. had pleaded that the house was artificially erected by him, (without saying by them) and the jury had found accordingly, it had been good performance, because the thing required to be done is done, and therefore there is difference between this case and the

case where *two covenant to go to York*, there the one cannot plead that he went, but must plead that they two went; for there is a *personal act to be done*; and the one cannot go to York by deputy as he may erect an house. Sid. 76. Pasch. 14 Car. B. R. Boulter v. Ford.

12. The Court conceived, a *covenant to do several things* is as several covenants, and though he might have assigned one breach, yet several are good enough; Judgment for plaintiff. 2 Keb. 69. pl. 43, Pasch. 18 Car. 2. Young v. Gosling.

13. A covenant was *between A. of the one part, and B. and C. of the other part, & quemlibet eorum*. A brings covenant against B. only, and good. 2 Lev. 56. Pasch. 24 Car. 2. B. R. Bolton v. Lee.

14. *A. and B. covenant with C. for themselves, and every of them, that if they renew such a lease, they will assign the term to C. A. dies*, and the covenant being broken, *C. sues the executor of A.* Objection that this is a joint covenant, and so ought, to survive in charge to B. But per Cur. it is joint and several, for (every of them) is as much as for (each of them) and so the party hath election to sue either the executor or the survivor. Freem. Rep. 248, pl. 262. Hill, 1677. May v. Woodward.

15. A covenant which is joint in itself shall be taken severally when the *breach assigned is a separate act of one of the parties*; per Holt Ch. J. Cumb. 164. Mich. 1 W. & M. in B. R. Coleman v. Sherman.

But if one only of the lessors had title to demise, then the action should have been brought against him only; and if neither of the lessors had any thing, then an action ought to be brought against them all, per Holt Comb. 164. S. C. — And Holt Ch. J. opening the mat-

16. *A. B. and C. in consideration of such a rent reserved by a deed poll concefferunt & dimiserunt* to the plaintiff, and on this covenant in law the plaintiff brought an action against A. and assigned for *breach that A.* and another by his command *entered on the plaintiff*; and he shewed further, that *A. B. and C. had nothing but that one D. was seised in fee.* A. the defendant pleaded that B. and C. were seised, and had power to demise, and traversed that D. was seised, and likewise traversed that the defendant entered and kept the plaintiff out; and upon demurrer to this plea it was adjudged, that this *action must be founded upon the word dimiserunt*, which is a *covenant in law*; for there was no express covenant, and therefore as the interest granted to the defendant by that word is joint, so must the covenant be; and if so, then this action being brought against the defendant alone, cannot be maintained, but it *ought to be brought jointly against A. B. and C.* who were the lessors, 1 Salk. 137. Mich. 1 W. & M. in B. R. Coleman v. Sherwin.

[459] ter, said, that this action was brought on a covenant in law made by the word *conceffi*; and it appears here, that the demise was a joint demise made by the defendants Sherwin, Dover, and Ensfield, and therefore this covenant implied by law, ought regularly to be joint; sed per Cur. in such a particular case as this is, where *one of the lessors had actually done wrong by his entry on the lessee without the assent of the others*, the covenant in law shall not be taken to be joint, so as to charge the other lessors with this *personal wrong* of their companion; for it is unreasonable that the innocent should be punished with the guilty, therefore as to that breach, (viz. the entry of Sherwin, and turning the plaintiff out of possession, the action is well brought against him alone; but as to the two other breaches assigned in the declaration,

ration, this action of covenant ought to be brought against the lessors, for as to that purpose the covenant in law is joint, and not several; for in such case there is no particular personal tort done by one more than another, and if several actions should be permitted in such cases, the plaintiff would recover damages two or three times for the same thing. — Carth. 98, 99. S. C.

(N. a) Pleadings. In Bar &c.

1. **TRESPASS** of taking for toll contrary to the grant of H. 3. the defendant pleaded grant of King John of the *aforsaid* custom; the plaintiff *alleged composition between the two vills*, and that the defendant by the taking had broke the composition; and per Knivet clearly he shall plead it as here, and shall not be drove to writ of covenant, and by consequence may rebut in this case, and shall not be drove to writ of covenant. Br. Barr, pl. 109. cites 39 E. 3. 13.

2. If a lease for years be by deed, and that the lessee shall not be charged of reparations, he shall rebut by this in action of waste, and shall not be put to action of covenant. Br. Covenant, pl. 42. cites 21 H. 6. 46.

3. Where a man grants to his tenant that he will not distrain him before such a feast, there if he distrains he shall have only an action of covenant; per Fineux Ch. J. But Brook makes a quære thereof, for he says it seems that it shall be pleaded in bar to avoid circuity of action. Br. Barre, pl. 52. cites 21 H. 7. 23.

4. And if a man leases land for life or years, and after grants by another deed that he shall not be impeached of waste, there if he brings waste, the other shall have only action of covenant, per Fineux Ch. J. But Brook says, that it is used to the contrary, for he may plead it in bar to avoid circuity of action. Ibid.

5. If a covenant be to make an estate by the advice of J. S. it ought to be shewn what advice J. S. gave; per Hobart Ch. J. Arg. Hob. 295. cites 26 H. 8. 1. and 16 E. 4. 9.

6. In covenant for not repairing, if damages are recovered, it was said by Manwood, that by this recovery of damages the lessee shall be excused for ever after from making of reparations; so as if he suffer the houses for want of reparations to decay, no action shall be afterwards brought thereupon for the same, but that the covenant is extinct. 3 Le. 51. pl. 72. Trin. 15 Eliz. C. B. Anon.

7. In debt upon an obligation to perform certain covenants in a pair of indentures; the plaintiff assigned the breach in one of the covenants, viz. that the defendant should do all reparations of such a house demised to him, and that he had not repaired, but suffered the same to decay. Defendant said, that the plaintiff had acquitted and discharged him of the reparations. Plaintiff demurred. Manwood said, that the same is an acquittal and discharge of the reparations, as well for the time past, as for the time to come, by force of the said covenant, and amounts to as much as if he had released the covenant. Then it was [460]

moved, if the covenant being broken for want of reparations? If now the acquittal and discharge, or release of the covenant, should take away the action upon the obligation which was once forfeited before? And Manwood held that it should not; for if one be bound in an obligation for the performance of covenants, and before the breach of any of them the obligee releaseth the covenants, and afterwards one of the covenants is broken, the obligation is not forfeited, for there is not now any covenant which may be broken, and therefore the obligation is discharged; but if the release had been after the covenant broken, otherwise; all which Dyer and Mounson concesso- runt. 3 Le. 69. pl. 105. Mich. 20 Eliz. in C. B. Anon.

8. *Release of all actions is no discharge of covenants not broken. And. 64. pl. 138. Mich. 23 & 24 Eliz. Digs v. Chute.*

9. *It was said to be adjudged, that in covenants perpetual, if they are once broken, and an action of covenant brought, and a recovery upon it, if they are afterwards broken, a scire facias shall be upon the judgment, and need not bring a new writ of covenant. Cro. C. 3. pl. 7. Hill. 24 Eliz. B. R. Swann's Case.*

10. *Lessee for years covenanted to build an house on the land within the first 10 years. In covenant the defendant pleaded that the lessor entered, and had possession for part of the 9th year &c. Per Gawdy he should have shewed, that the plaintiff would not suffer him to build; and the other Justices seemed of the same opinion; but would advise. Godb. 69. pl. 84. Mich. 28 & 29 Eliz. B. R. Barker v. Fletwell.*

Cro. E. 332.

Taylor v. Beal, S. C. but stated only that the lessor by covenant was to repair, but nothing said as to lessee's repairing it; Gawdy conceived, that the law gave liberty to the lessee to expend the rent in reparations, or otherwise the house may fall upon his head before it be repaired. But Fenner contra; for if lessor will not repair it, lessee is to have his covenant against him. Clench agreed with Gawdy, but that lessee should have pleaded it, and cannot give it in evidence on the general issue, (as in this case he had done as stated here.)

11. *The lessor covenants that the lessee shall repair the tenements, when they are ruinous, at the charge of the lessor; in debt for rent, the lessee pleaded that matter, and that according to the covenant he had repaired the tenements, being then ruinous, with the rent, and demanded judgment if action &c. and good; per Gawdy and Clench Justices; cites 11 R. 2. Bar. 102. but Fenner J. contrary, for each shall have action against the other, if there be not an expresse covenant to do it. Le. 237. in pl. 320. Mich. 32 & 33 Eliz. B. R. Beal v. Taylor.*

Brownl. 89. Mich. 3 Jac. Jeffery v. Guy, S. C. — Yelv. 78. S. C. and Brownl. seems only a translation of Yelv.

12. *In debt on bond for performance of covenants the defendant pleads a release, and issue is joined upon it, and found for the plaintiff, and he has judgment, and affirmed in error, though the plaintiff did not alledge any part of the bond, and a breach of it in the defendant; for the plaintiff is forced by the defendant's plea to answer to the release, and has no occasion to shew any breach of covenant; for the law requires that, when it is pleaded that no bond was made, and not where the bond and*

and breach are confessed, as in this Case is impliedly done. Jenk. 280. pl. 4.

13. [The plaintiff is not bound to alledge a special breach when the defendant's plea contains special matter, [As in] debt upon bond for performance of covenants in a lease made by A. tenant in tail, in which was a covenant, that A. might enter from time to time to view the reparations. Defendant pleaded, that A. died, and that B. the issue in tail, entered before any covenant was broken. The plaintiff replied, that B. came with him on the lands to view the reparations, and traversed; that B. entered modo & forma prout &c. The plaintiff had a verdict. Error was brought, for that no breach was alledged of covenant in the defendant, and so there was no cause of action. But per Cur. it needed not in this case; for by the special issue tendered by the defendant, viz. that the issue in tail made an entry on him before any covenant broken, he enforced the plaintiff to make a special replication to the point tendered, and so cannot assign any breach of covenant, but must necessarily answer to the special matter alledged. Yelv. 78. Mich. 3 Jac. B. R. Jeffrey v. Guy.

Brownl. 89. S. C. but seems only a translation of Yelverton.

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14. A warrantia chartæ depending is no bar in covenant; because they are of several matters, one real, and the other personal. See Hob. 3. pl. 6. Hill. 5 Jac. Pincombe v. Rudge. And ibid. 28. S. C. cited by Hobart Ch. J. And see Yelv. 139. S. C.

15. In covenant against lessee for non-payment of rent, he pleaded, levied by distress. Plaintiff demurred, and judgment for him; for this plea is a confession that it was not paid according to the reservation; for the plaintiff could not distrain unless it was behind after the day. 2 Brownl. 273. Mich. 7 Jac. C. B. Hare v. Savill.

Brownl. 199. S. C. Action of covenant brought upon an indenture upon a special covenant to pay rent at

certain days therein specified and reserved. The defendant pleads, that no rent was behind. The plaintiff demurs to that plea; and it was held by the whole Court to be a bad plea in covenant, for by that plea the defendant confesses the covenant broken, and that plea tends but to mitigation of damages. Brownl. 19. Trin. 7 Jac. Hare v. Savill.

16. In debt upon an obligation with condition to perform covenants in an indenture of lease, the defendant pleads, that after, and before the original purchased, the indenture was by the assent of the plaintiff, and the defendant cancelled and avoided, and so demands judgment of the action; and seems by Coke clearly, that the plea is not good without averment that no covenant was broken before the cancelling of the indenture. 2 Brownl. 167. Pasch. 10 Jac. in C. B. Anon.

17. Action of covenant brought, for that the defendant did not pay a rent with which the land was charged; the defendant pleads he was to enjoy the lands sufficiently saved harmless, and answers not to the breach; and adjudged a naughty bar by the whole Court. Brownl. 22. Mich. 12 Jac. Cowling v. Drury.

18. Accord with satisfaction by deed is a good plea in discharge of covenant, as well before the breach as after, because it is an

In action of covenant a concord is

not pleadable in bar unless it be executed on both parts. 3 Lev. 189. Mich. 36 Car. 2. C. B. Ruffel v. Ruffel.

19. Pleading by way of bar or replication, that *testatum existit per talem indenturam* is not good, though in a declaration it is sufficient to induce the action and assign the breach; per tot. Cur. Cro. J. 537. pl. 2. Trin. 17 Jac. B. R. in Case of Bultivant v. Holman.

20. Lessee covenants to do all reasonable carriages for his lessor *with his carts &c.* Lessee pleads he has no cart &c. A good plea; for he is not bound to keep carts &c. on purpose. Lat. 202. Hill. 2 Car. Manners v. Vesey.

21. The plaintiff brings an *action for breach of covenant upon a deed*; the defendant *pleads a parol agreement afterwards in discharge* of the former covenant; but the Court held the plea not good. Sty. 8 Hill. 22 Car. B. R. Fortescue v. Brograve.

[462] 22. In covenant for not repairing &c. the plaintiff shews for breach, that the house was burnt down through the negligence of the defendant &c. and that he did not repair it. The defendant traversed that it was not burnt down, prout &c. and adjudged an ill traverse; because the defendant's not repairing is the substantial part, the other being but inducement. Hard. 70. cites Pasch. 24 Car. B. R. Allen v. Reeve.

Sty. 88. S. C. but no judgment.

23. In covenant &c. for non-payment of rent, the defendant pleaded in bar, that the plaintiff entered into part of the land demised before the rent due, for which the action was brought, and so had suspended his rent; the plaintiff replied, that the defendant did re-enter, and so was possessed of his former estate. Upon demurrer Roll Ch. J. said, the plaintiff ought to shew that the defendant entered and continued in possession till after the rent became due; therefore nil capiat per billam, nisi. Sty. 432. Hill. 1654. Page v. Parr.

24. In an action of covenant on demise of a free-stone quarry to the defendant, the defendant covenants *not to dig in any other part of the common*, and now breach being assigned in digging, the defendant pleads *non locavit the quarry prædict.* to to which the plaintiff demurs, the demise being by indenture, and the covenant collateral. The Court agreed the plea frivolous; judgment for the plaintiff, nisi. Keb. 751. pl. 44. Trin. 16 Car. 2. B. R. Armin v. Bowes.

25. In debt for rent on a lease for years, the defendant pleaded in bar that the lessor did covenant, that the lessee might deduct so much for charges, and upon demurrer this was adjudged a good plea, it being a thing executory and the covenant in the same deed, and the party shall not be put to circuity of action and to bring an action of covenant. Lev. 152. Mich. 16 Car. 2. B. R. Johnson v. Carre.

26. In covenant or a conveyance upon a covenant, *that the vendor was seised in fee, and breach assigned that he was not seised in fee, the defendant pleaded quod non infregit conventionem suam*, this is ill, being too general and argumentative, upon a demurrer, but it is helped after a verdict. 1 Lev. 183. Trin. 18 Car. 2. B. R. Walsingham v. Comb.

Sid. 189.
pl. 5. S. C.
— Gilb.
Hist. of
C. B. 124.
cites S. C.
and says
that in
covenant

the defendant ought to traverse the deed or the breach, and both cannot be involved in non fregit conventionem.

27. Defendant pleads in bar of breach for *non-payment of rent a former bargain and sale* of the same land, *without pleading entry* accordingly, it was said no entry was requisite being on the Statute of Uses. Sid. 399. pl. 6. Hill. 20 & 21 Car. 2. B. R. Banks v. Smith.

28. If *lessor after assignment* of the reversion brings covenant, lessee cannot plead that he has assigned over his reversion, but either lessor or his grantee, who brings the first action of covenant and recovers, shall bar the other (viz.) Lessee shall plead such a recovery in bar to the 2d action. Sid. 402. per Twissden J. Hill. 20 & 21 Car. 2. B. R.

3 Lev. 154.
Mich. 35
Car. 2. C. B.
in Case of
Beely v.
Purty S. P.
Arg.

29. In an action of covenant *to repair from time to time a house demised*, the defendant *pleaded that before the action brought, the house demised being burnt in the fire was repaired in convenient time*, to which the plaintiff demurred, because it was *not shewn by whom it was repaired; and in truth it was rebuilt by the plaintiff*; and per Twissden J. this is no performance of the covenant, unless it be shewed to be done by the defendant himself, though reparation by a stranger be an excuse of waste; sed curia contra, that being repaired, it is a good plea by whomsoever; but this being a hard case, the Court gave leave to the plaintiff to wave his demurrer, and take issue that he did not repair it in convenient time, the house being yet uncovered. 2 Keb. 535. pl. 53. Trin. 21 Car. 2. B. R. Walton v. Johnson.

3 Keb. 40.
pl. 10. Trin.
24 Car. 2.
B. R. Wal-
ton v. Water-
house
S. C. the
Court held
that the
defendant
must shew
who repair-
ed it; for
if the plain-
tiff built it
this is no
excuse; and
judgment

for the plaintiff. — 2 Saund. 420. S. C. adjudged that the plea was ill, because not shewn by whom it was rebuilt; though it was objected that it was not material by whom it was rebuilt; and if by a stranger it could not be built again by the defendant; and he having assigned all his interest before, it lay not in his notice by whom it was built, but that it could not be presumed to be built by the plaintiff, for that he could not intermeddle with the possession during the term; but by the reporter, it being alledged, that the plaintiff had rebuilt at his own charge, Hales refused to hear the reasons, & quasi in a passion, without considering the matter in law, gave judgment for the plaintiff.

30. Debt upon bond, conditioned to perform covenants, one of which was for payment of so much money upon making such an assurance; the defendant *pleaded that he had paid the money on such a day*; upon a demurrer the plaintiff had judgment, because the defendant did not say in the plea when the assurance was made, that the Court might judge that the money was immediately paid pursuant to the condition. 2 Mod. 33. Pasch. 27 Car. 2. C. B. Duck v. Vincent.

31. It was agreed, that a *release of all debts, duties, and demands, did not release covenants that were broken*; nor any other word but the word covenant. *Freem. Rep. 235. pl. 245. Mich. 1677. Anon.*

32. When *debt on bond to perform covenants in a deed* is brought, and the defendant cannot plead covenants performed without the deed, because the plaintiff has the original deed (and perhaps defendant took not a counterpart of it), we use to grant *imparlances* till the plaintiff brings in the deed; and upon evidence if it be proved, that the other party has the deed, we admit copies to be given in evidence. *Per. Cur. Mod. 266. pl. 17. Trin. 29 Car. 2. C. B. Anon.*

33. Where covenants are *reciprocal*, non-performance by one is no bar to the action of the other. *2 Jo. 216. Trin. 24 Car. 2. Shower v. Cudmore.*

34. In covenant the *breach assigned was, that the defendant did not repair*. The defendant pleaded generally *quod reparavit & de hoc ponit se super patriam*. This was held good after a *verdict*. *2 Mod. 176. Hill. 28 & 29 Car. 2. C. B. Harman's Case.*

35. In covenant *on an indenture for rent, nil debet is no plea*, and judgment was given for the plaintiff. *3 Lev. 170. Trin. 36 Car. 2. C. B. Tindall v. Hutchinson.*

36. Covenant *upon a demise for years, rendering rent*; and breach assigned for non-payment. Defendant pleads, that part of the rent was to be allowed &c. *Per Cur.* This a covenant against a covenant, and judgment nisi for the plaintiff. *Comb. 21. Pasch. 2 Jac. 2. in B. R. Burroughs v. Hays.*

37. In an action of covenant the plaintiff declared, that whereas by an agreement in writing made between him and the defendant, it was agreed between the said parties for a *demise of a lease for 99 years, of and in a certain messuage &c. under a certain rent, and the usual covenants as in all demises granted by the trustees of the Earl of Rochester were used, omnium quorum considerations, the said E. did agree to pay the said C. 180*l.* at Michaelmas next following, & licet the plaintiff performed all of his part, the defendants had not paid the money &c.* the defendant pleaded in bar, that the plaintiff *tempore quo supponitur præd. conventionem fieri nec unquam postea nihil habuit in tenementis præd. so agreed to be demised*. To this the plaintiff demurred, and judgment by the whole Court was given for the plaintiff, for though that may be pleaded in an action for debt for rent, yet it cannot be pleaded in covenant for a sum in gross. Besides, the agreement does not necessarily import that the lease should be made by the plaintiff; it may be understood, that it was agreed that he should procure a lease for the defendant. *2 Vent. 99. Mich. 1 W. & M. in C. B. Clarke v. Peppen.*

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2 Vent. 217.
Mich. 2.
& M. in

38. A. covenants with B. *to pay him 300*l.* for the use of the wife of A. for her life only, and covenant brought upon this, and breach assigned, that there was so much of the 300*l.* arrear;*

arrears; defendant pleads that there was ~~another indenture~~ between him and the plaintiff *since* the date or delivery of the covenant deed declared on, *reciting the said covenant and agreement* for the payment of the 300l. *wherein it was covenanted and agreed, that so long as A. and his wife did cohabit, the payment of the 300l. should cease; and avers, that they did cohabit for the time the said arrears became due, and pleads this in bar of the first agreement.* There are express words that the payment shall cease during the cohabitation; and there had been no great harm to construe this as a release of the arrearages during the cohabitation; but yet it being a sum in gross, and the covenant temporary and not perpetual, they held it no good bar. 12 Mod. 552. cites 2 Vent. 217. Gawden v. Draper.

C. B. —
S. C. cited
by Holt Ch.
J. in deli-
vering the
opinion of
the Court
Trin. 13
W. 8. Ld.
Raym. Rep.
691. and
said that
it was
a sound
judgment.

39. Where *proviso* goes by way of *disseisin* of a covenant, it must be pleaded on the other side, but it is otherwise where it goes by way of *explanation or restriction* of the covenant; per Holt Ch. J. and judgment accordingly. 2 Salk. 574. pl. 2. Hill. 10 W. 3. B. R. Clayton v. Kinafton.

12 Mod.
221. S. C.
and Judg-
ment for the
plaintiff.

40. If A. covenants with B. *to convey to him all his right and title* to the Manor of D. to which A. has no right, it is not a good plea in an action of covenant, *that he had no right &c.* But he must make such a conveyance as would in truth pass all his title in case he had any; and he is *stopped* by his covenant to say he had no title. Per Holt. 12 Mod. 399. Pasch. 12 W. 3. Anon.

41. In *debt on bond for performance* of covenants if the defendant pleads an *ill-bar*, and the plaintiff *replies and assigns a breach which of his own shewing appears to be no breach*, the defendant shall have judgment; Arg. 2 Ld. Raym. Rep. 1080, 1081. Mich. 3 Ann.

(O. a) Plea in Excuse.

1. IN covenant the defendant *covenanted to give security*; the defendant *pleaded that he offered security*, and resolved that it was not good. Poph. 206. Arg. cites Mich. 2 Car. B. R. Koffe v. Harvey.

2. A *private act of parliament* which makes the conveyances of A. void, is no excuse of breach of covenant entered into by B. to C. for quiet enjoyment by C. of lands conveyed by B. to C. being part of the lands before conveyed by A. to B. and the conveyance whereof is made void by the private act of parliament. Vent. 175. Mich. 23 Car. 2. B. R. in Case of Lucy v. Levington.

2 Lev. 26.
S. C. Hale
and Rains-
ford held,
that this act
of parliam-
ent makes
not any new
title, but
only removes

an obstruction of the old; and said, that doubtless A. was named in the covenant for this purpose, in case a fine levied by one claiming under A. and unduly obtained from her should be avoided; but Twissden being of a contrary opinion, error was immediately brought, but what became of it the reporter says he knows not. — a Keb. 831. pl. 54. S. C. the action being brought by the executors, judgment was given for them also, this statute being in nature of a judgment, and not of a legislation.

3. In pleading an excuse for non-performance the party *must shew all done* by him that he was obliged to do; per Holt Ch. J. Show. 335. Mich. 3 W. & M. Wynne v. Fellowses.

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(P. a) Pleadings. Performance.

Br. Condi-
ditions,
pl. 198.
cites 33
H. 8. S. C.

1. A Man cannot plead *generally* quod performavit omnes et singulas conventiones in indentura prædict. *specificat. ex parte sua* perimplendas, but *shall shew certainly in every point how* he has performed; and where in covenant the defendant says that the covenants are that he shall pay 10l. by such a day, and infeof him by the same day, quas quidem conventiones idem def. bene perimplevit, this is no good plea; for he shall shew how he has performed it certainly. Br. Covenant, pl. 35 cites 31 & 33 H. 8.

2. Debt upon bond for non-performance of covenants in a lease, one of which was, *that the defendant and his assigns should discharge the plaintiff of all charges ordinary and extraordinary &c.* The defendant pleaded, *that he was possessed &c. till such a day, during which time he paid the rent, which was all the charge ordinary or extraordinary to that day, and then he assigned the premises to P.* And upon a demurrer this was held an ill plea, because the covenant being in the copulative, that he and his assigns should discharge the plaintiff, it *ought to have been pleaded conjunction*, viz. *that he and his assigns did discharge him.* D. 26. b. pl. 172. and 27. b. pl. 177. Hill. 28 H. 8. Abbot of Westminster v. Leman.

3. A. bound himself in a recognizance to B. to permit B. and all his tenants in D. to have common of pasture for their cattle in the fields of D. when they should lay fallow, and A. further covenanted not to do, suffer, or cause to be done, any act or thing to alter the courses of the fields in D. otherwise than now they are. In a scire facias brought in Chancery upon this recognizance &c. A. pleaded as to the first covenant, *that he had permitted the said B. and all the tenants of D. to have common &c.* And to the other covenant he pleaded in bar generally, that he had not altered the course &c. On demurrer, because the pleading was general, the opinion of divers Justices was that the plea was good; but Harper totis viribus e contra; but it was ordered against him. Dy. 279. pl. 6. Mich. 10 & 11 Eliz.

* Co. Litt.
303. b.
S. P. and
he must
shew which
of them he
has per-
formed.

4. Articles or covenants which are in the *disjunctive*, ought always to be pleaded specially to be performed, but such as are in the *copulative*, and in the *affirmative*, may be pleaded to be performed generally; Arg. Sav. 120. Trin. 29 Eliz. in pl. 189.

† Co. Litt. 303. b. S. P.

Cro. E. 232.
pl. 3. S. C.
& S. P. held

5. Where any of the covenants are in the *disjunctive*, so that it is in the election of the covenantor to do the one or the other, there

there it ought to be *specialy pleaded*, and the performance of it; for otherwise the Court cannot know what part hath been performed. Le. 311. pl. 430. Pasch. 33 Eliz. C. B. *Oglethorpe v. Hide.*

accordingly, but the case being in debt upon bond to perform

covenants, whereof *some are in the negative, and some in the affirmative*, and the defendant pleaded performance generally, it was held to be only matter of form, and aided by the Stat. 27 Eliz. unless shewn for cause of demurrer, that some are in the negative, and some in the affirmative; for the Court shall judge according to the truth of the matter. — Cro. J. 559. pl. 7 Hill. 17 Jac. B. R. *Lea v. Luthel*, S. P. adjudged accordingly. — Palm. 70. *Ley v. Luttrell*, S. C. & S. P. agreed by all. — Co. Litt. 303. b. S. P. accordingly; for a negative cannot be performed. — S. P. per Cur. 8 Rep. 183. b. but if the plaintiff replies and assigns an ill breach, and the defendant demurs, he shall have judgment, because upon the whole record it does not appear that the plaintiff had any cause of action. — Sty. 163. Mich. 1649. B. R. *Fines v. Dell*, it was held on demurrer, that *where some of the covenants were in the affirmative, and others in the negative*, a general pleading of performance to all is not sufficient; for as to the covenants in the affirmative, he ought to plead a special performance, and shew how he has performed them, and judgment nisi. — Gilb. Equ. Rep. 253. cites S. C. of *Oglethorpe v. Hyde*, [466] and 8 Rep. 133. Pasch. 8 Jac. *Turner's Case*, alias, *Turner v. Lawrence*, and says, that a negative cannot be said to be performed in a proper literal sense, (though the not doing may improperly be called a performance) and therefore on a special demurrer the defendant's plea would be bad; aliter on a general demurrer; where some of the covenants are in the disjunctive, there the defendant cannot plead performance generally, because both the alternatives are not to be performed, and by pleading performance generally he does not shew in certain which is performed by him, and therefore this is bad on a general demurrer, which shews the want of that certainty; but where the plaintiff does not demur for want of such certainty, it shall be intended that the defendant performed one of them, and therefore good enough; but in both these cases, where the covenants are in the negative, or the disjunctive, and the defendant pleads performance generally, and the plaintiff replies and assigns a breach which is ill assigned, and the defendant demurs, the plaintiff shall not take advantage of this ill pleading of the defendant's, because by his replication he admits the performance of all the other covenants, but that only where he undertakes to assign the breach.

6. Where there are in an indenture covenants *in the negative for not doing, and in the affirmative for doing*, the defendant ought to plead specially to the negatives that he has not broken them, and to the covenants in the affirmative generally, that he has performed them all. Mo. 856. pl. 1175. Mich. 11 Jac. C. B. *Resolved per tot. Cur. Norton v. Syms.*

7. When the covenants negative are against law, and the affirmative lawful, there he may plead performance generally, and the Court is to take notice that the covenants in the negative were void and against law. Mo. 856. pl. 1175. Mich. 11 Jac. C. B. *Norton v. Sims.*

8. When all the covenants are in the affirmative and matter of fact, the pleading performance of all the covenants, without shewing how, is good; agreed by all. Palm. 70. Mich. 17 Jac. B. R. in *Case of Ley v. Luttrell*,

S. P. Holt's Rep. 307. Arg. in *Case of Annesley v. Cutter.*

9. Covenant to go in such a ship out of the River Thames to G. in Spain, and that *decederet, procederet, & non deviare*t. The defendant pleaded performance generally. The Court held the plea ill, and took a difference between a negative covenant which is only in affirmance of an affirmative covenant precedent, and a negative covenant, which is additional to the affirmative covenant, as here; for in the first case performance generally is a good plea, but not in the last; but he ought to plead specially; and in the principal case the defendant ought to have departed and proceeded, and might have gone to Africa or the West-Indies if he had not been restrained by the negative covenant,

Keb. 334. pl. 5. *Lathwell v. Fisher*, S. C. adjournatur. — Ibid. 372. pl. 70. *Lathwell v. Palmer*, S. C. the Court held the plea ill, as if they had been several

covenants,
but the
Court
advised
amendments by agreement.

nant, viz. quod non deviaret, and so it is clearly conditional. Sid. 87. pl. 1. Mich. 14 Car. 2. B. R. Laughwell v. Palmer.

Sid. 328.
pl. 9. Gam-
ferd v. Grif-
fith, S. C.
the Court
upon several
arguments
inclined,
[semble]
that the last
words did
not qualify
or mitigate
the first,
but that they
are distinct

10. In Assignment of a lease it is covenanted, *that the lease then was bona, certa, perfecta, & indefeasibilis dimissio in lege anglie lease in law &c. & ita stabit & remanebit querenti durante residuo of the said term &c. and that the plaintiff quiete & pacifice haberet, teneret &c. durante toto residuo termini, without any let &c. of the defendant &c.* A stranger enters, and a breach is assigned, *that at the time of making the assignment the lease non fuit bona, perfecta & indefeasibilis &c. Et judic. pro Quer.; for the first sentence is indefinite, and has no connection with the latter sentences.* Saund. 51. 61, Pasch. 19 Car. 2. Gainsford v. Griffith.

clauses, but yet they allowed the rule, that restraining clauses at the beginning, or at the end of a sentence, shall govern the whole; but that here the last words, (That he shall enjoy it without the let or interruption) cannot, without impropriety of speech, be applied to the first clause of (indefeasible lease.)—2 Keb. 201, 202. pl. 34. S. C. the Court agreed, that had the [467] words been to enjoy notwithstanding any act, that should have gone to the whole; fed adjournatur.—Ibid. 213. pl. 51. S. C. the Court agreed, that the latter words could not qualify the former, they not being sense if joined together; and Judgment for the defendant.

If he does
not demand
oyer of the
indenture it
is a good

11. A man cannot plead performance of covenants in an indenture *without shewing the indenture.* Sid. 425. pl. 8, Mich. 21 Car. 2. B. R. Tapscot v. Woolridge.

cause of demurrer. Vent. 37. S. C.—Ruled, that on such plea he must shew the indenture. Sid. 97. pl. 25, Mich. 14 Car. 2. B. R. Lewis v. Ball.—Keb. 415. pl. 124. Lewis v. Bull. S. C. & S. P. adjudged.—Carth. 5. Hill. 2 & 3 Jac. 2. in Case of Fortune v. Davis, S. P.

12. An ill plea of performance of affirmative covenants is not aided by the replication, as the plea of performance generally to negative covenants may be. Show. 1 Pasch. 1 W. & M. Fitzpatrick v. Robinson.

13. M. bargained and sold to B. the plaintiff and his heirs a messuage &c. and also ingress, egress, regress at all times for B. his heirs and assigns, from the gatehouse to a well adjoining, to draw water for his and their necessary occasions. Debt upon bond for performance of covenants, one of which was, *that he was seised in fee of the premises*, and another was for quiet enjoyment, and free from all incumbrances, and another was for a farther assurance &c. The defendant pleaded performance generally. The plaintiff replied, *that at the time of sealing &c. he was not seised in fee secundum formam &c. conventionis &c.* of the said well, prout &c. And upon demurrer it was objected, that there was no covenant in the indenture that he was seised in fee of the well, and of this opinion were all the Court, and consequently (though it was not expressly said by the Court) the other covenant, that he was seised in fee of the messuage and premises, do not extend thereto, and therefore the replication was not good. But Powell J. said, that the plain-
iff

tiff ought to have alledged, that the plaintiff [defendant] had not any power to grant the said liberty to draw water out of the said well. But then an exception was taken to the plea, because in the indenture is a covenant for quiet enjoyment against all incumbrances &c. and to such covenant the defendant could not plead performance generally, but he ought to have set forth, that the house was free from incumbrances at the time of the conveyance made, and not incumbered in any manner, and that no farther assurance has been required, or such an assurance; and no other, which he had executed. But per Cur. this plea was held good in substance, but Powell J. said it was not the best way of pleading, but that it had been better if pleaded as above-mentioned. Lutw. 603. 608, Hill, 13 W. 3. Butterfield v. Marshall.

14. Where the covenants are to do a matter of law, as to convey; discharge an obligation, ratify, or to confirm &c. there it must be *pleaded specially*, because it being a matter of law to be performed, it ought to be exhibited to the Court to see it be well performed, who are judges of the law, and not to a jury who are judges of the fact only. Gilb. Equ. Rep. 253. in Case of Fitzpatrick v. Strong, cites 1 Le. 172. Dy. 229.

(Q. 2) Pleadings as to Conditions for Per- [468] formance of Covenants.

1. **D**EBT upon obligation; the defendant said, that it is *indorsed* upon condition, *that if the defendant observed the covenants* contained in certain indentures, that then &c. and said, *that in the indenture is contained, that he shall do such and such a thing, and that he has done them*, and the plaintiff *e contra*, and found for the plaintiff; and the defendant pleaded in arrest of judgment, that *the defendant has not alledged that those are all the covenants contained in the indenture, and yet good by all the Justices; for where the plea is referred to a certainty, as here, to the indenture, it shall be intended that this is all which is in the indenture, and after the plaintiff recovered;* quod nota; Br. Conditions, pl. 144. cites 6 E. 4. 1.

2. Debt upon obligation with condition *to perform all covenants* contained in certain indentures, the defendant cannot *plead the condition and rehearse the covenants, and say generally, that he has performed all the covenants; but shall shew how;* per tot. Cur. Br. Conditions, pl. 2. cites 26 H. 8. 5. and 20 H. 8. and 35 H. 8. accordingly; quod nota.

3. As touching conditions for the performance of covenants in indentures, the defendant ought to *plead the indenture, and the special manner particularly, how he hath performed every covenant.* Heath's Max. 46. cites 27 H. 8. 1. and 33 H. 8. Brook Covenant, 35, and D. 279. 11 and 12 Eliz. and D. 26. 28 H. 8. But says, that as it seems there one need

not

not aver, *quæ sunt omnia & singula conventiones* &c. because referred to a matter in writing. The like of a record; and for that reason it seems of necessity that he need not to plead *prout in eadem indentura* &c, *Quære* tamen. But if not referred to writing or record then it shall be otherwise. As if I am bound to infeoff you of all my lands in *Dale*, I must shew the number of acres, and plead also *quæ sunt omnia* &c. But says, that at this day the course of the practice is (notwithstanding the covenants are reduced into writing after they are recited in the plea) to insert this clause, *prout per eandem indenturam plenius apparet*. Heath's Max, 46.

4. Debt on bond against H. P, for performance of covenants, by which the plaintiff covenanted, that E, the defendant's brother *should enjoy such lands till Michaelmas following, rendering rent*, and H. the defendant covenanted, *that his brother should quietly surrender the lands to the plaintiff, and that the defendant would permit the plaintiff to have in the mean time free ingress, egress &c. to such lands as by the custom of the country should lie fresh*. The defendant pleaded, *that he did permit the plaintiff to have free egress and regress &c. into such lands as by the custom of the country did then lie fresh*. Exception was taken to this plea, for that the defendant did not shew which lands did lie fresh according to the custom of the said country; but adjudged, that where an act is to be done according to a covenant, he who pleads the performance of it ought to plead it specially, but in the principal case no act was to be done but a permittance as above said, and it is in the negative, not a disturbance, in which case permittit is a good plea, and then it shall come on the plaintiff's part to shew into what lands the defendant non permittit him to have free ingress and regress &c. and cited this difference to be so agreed by the whole Court in 17 E. 4. 26. And so was the opinion of the whole Court in the principal Case. Le. 136. pl. 186. Mich. 30 Eliz. C. B. Littleton v. Pernes.

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a[Roll. Rep. 159. Ley v. Luttrell, S. C. says, that judgment was given against the defendant upon the point of its being a matter of record, and that the better opinion also was, that the plea was not good because that J. S. and his wife were

5. Debt upon obligation to perform covenants in an indenture, which were, 1st, That he should marry M. the plaintiff's daughter before such a day, 2dly, That J. S. [a stranger] and [E.] his wife should levy a fine of such lands to the defendant and the said M. and to the heirs of their bodies. 3dly, That the inheritance of the said lands should remain in the said J. S. or himself till the fine levied. 4thly, Whereas he had made a lease for years of part of Marth-Wood to the said M. the plaintiff's daughter, *that he had not made any former grant, nor should make any thereof without the plaintiff's assent*. To the last covenant in the negative the defendant pleaded, *that he had not made any former grant of the lease, nor any grant after the obligation without the plaintiff's assent, and as to all the other covenants that he had performed them*. Resolved, because the covenant to levy the fine is an act to be done by a stranger, and to be performed on record, in both which cases he ought to plead and shew how he had performed it; for acts

* *act of record must be shewn specially*; 2dly, The covenant being in the † *disjunctive*, he ought to have shewn specially which of them, and not pleaded performance generally. And 3dly, He pleads he *did not grant without the plaintiff's consent*, which is a † *negative pregnant*, and so not good, and Judgment for the plaintiff. Cro. J. 559. pl. 7. Hill. 17 Jac. in B. R. Lea v. Luthell.

strangers to the act, viz. to the levying of the fine, and also to the indenture of covenants, but says the

Court were not agreed as to this reason. — Palm. 70. S. C. adjudged upon the point as mentioned in a Roll. Rep. supra. But Montague said, he saw no difference in reason, when the act is to be done by a stranger, and when by the party, and if a condition be, that the obligee should do an act to a stranger, there he ought to shew how he has performed it. Doderidge said, that the reason is, because the obligee is a stranger to him who ought to do the act, and therefore the obligor ought to shew how this act was performed by the stranger; and Haughton said, that the reason is, because he cannot say that he performed all covenants when the act is not done by him. — But Kelw. 95. b. pl. 3. Mich. 22 H. 7. cites Mich. 1 H. 7. where it was agreed, that if the condition be, that J. S. a stranger shall infeof the obligee, the pleading a general performance is sufficient.

* But Co. Litt. 303. b. says, that if any covenants in the condition are to be done of record, the defendant must shew the performance specially, and cannot involve it in general pleading.

† Co. Litt. 303. b. S. P. accordingly.

‡ Co. Litt. 303. b. S. P. accordingly.

6. In debt upon bond for performance of covenants, which was, that the defendant (being a *sheriff's officer*) should not let go at large any person arrested without the licence or warrant of the sheriff; and the breach assigned was, that he let at large at Westminster, without any warrant &c. such a person who was arrested, but did not set forth the place, or the time when the person was arrested. All the Court held the declaration good, because the escape, or the letting at large, was the material part of the covenant, and the modus or manner of the arrest is not in question, nor any part of the covenant, but the letting him go at large is the substance of the covenant, and that is alleged to be at Westminster. Sid. 30. pl. 6. Hill. 12 Car. 2. C. B. Jenkins v. Hancock.

7. There is a diversity between covenants in indenture consisting of several parts in the affirmative, and a condition of a bond consisting of several parts; for in the last case he must shew in pleading that he has performed the several things comprized in the condition particularly, but in the case of covenants performance generally is a good plea. Sid. 215. in pl. 18. cites Mich. 16 Car. 2. Brooks v. Down, where in debt on bond conditioned to deliver a brief at every church &c. before such a time &c. the defendant pleaded, that he delivered at the church &c. but did not say at what time &c. and upon demurrer it was adjudged for the plaintiff, that the bar was insufficient.

The plaintiff demurred, because he ought to have pleaded expressly according to the very words of the condition, and not generally, as he did by this plea; and of such opinion the

Court seemed to be; sed adjournatur. Lev. 145. Mich. 16 Car. 2. B. R. Brooks v. Dean, S. C. — So where the condition further was to deliver the money collected on such briefs before such a time, and because he did not set forth particularly what sums he received, but only pleaded performance generally, it was adjudged ill. Sid. 215. Trin. 16 Car. 2. B. R. Woodcock v. Cole.

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8. Action of Debt upon a bond, the condition was to seal an indenture of demise, and to perform all covenants, contained there-
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in. The defendant pleads, that he sealed the demise, and performed all the covenants therein. The plaintiff demurs, because he does not set forth what the covenants are. Judgment pro quer. nisi. Freem. Rep. 20. pl. 23. Mich. 1671. in B. R. Brian v. Munteth.

9. Debt upon bond for performance of articles, which were that defendant should educate, keep, maintain, and provide for C. the defendant's son, in one of the universities in this kingdom, until he had passed all his degrees, and was a master of arts in one of the said universities; and when he became master of arts, as aforesaid, the plaintiff was to pay so much to the defendant for his said son's use. Defendant in his plea answered to every thing, but only that he did not shew who maintained him from the time he became bachelor of arts, until he became master of arts, and for that reason Judgment was for the plaintiff. Holt's Rep. 206. pl. 12. Hill. 5 Ann. Annesley v. Cutter.

(R. a) Issue. Trial. Judgment and Recovery of what.

If the term be not expired, he shall recover the term again if he has put him out; but if a stranger puts him out by eigne title, then he shall recover all in damages against the lessor. F. N. B. 145. (M)

1. IF the lessor ousts the lessee he shall have covenant, and shall recover his term and damages, and if the term be expired he shall recover all in damages. Br. Covenant, pl. 33. cites 26 E. 3. and Fitzh. Covenant, 3.

2. If tenant in tail makes a lease for years by deed, and dies seised of assets in fee-simple, yet the issue in tail may enter, and therefore the lessee shall have a writ of covenant against him to recover damages, but not to recover the term; for his entry was lawful cites 38 E. 3. 24. note, the writ of covenant for the lessee who is ousted by a stranger by title is, quod teneat convent. &c. De damnis & de perditis. F. N. B. 145. (M) in the new notes there (c).

Br. Conditions, pl. 298. cites S. C.

3. Covenant by the lessee for years against the lessor for ousting him within the term, and the other justified by clause of re-entry for rent arrear; and the plaintiff said, that there was a parlanche between him and the defendant, that the defendant shall be at table with the plaintiff and recoup the rent according to the rate, by which for such time he recouped so much, and the rest was 4s. which he tendered, and the defendant refused, and yet he is ready, and tender the money to the Court, Judgment; and prayed restitution of the term and damages; and so see, that by action of covenant he shall recover his term; and the defendant said, that such a day the plaintiff shewed to him that victuals were dear, and therefore desired him &c. by which he re-entered for the rent; and the other said, that he departed of his own free will,

will, absque hoc that he desired him; and after he waived this, and said that he was ready at the day to have paid &c. If any had come to demand it &c. Brooke makes a *quare*, if such parlance, as above, *without deed*, be sufficient to discharge covenant which is by deed? for it is not sufficient; per Parle. Br. Covenant, pl. 13. cites 47 E. 3. 24.

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4. In covenant the plaintiff counted upon several covenants, and well, and the defendant answered to all; for he shall recover *damages severally for every covenant*. Br. Covenant, pl. 34. cites Fitzh. Issue 86. and M. 10 H. 6. 23. accordingly.

5. In action of covenant a man may take issue upon *every covenant* to have the more in damages; *contra in debt upon an obligation for non-performance of several covenants*, for there the breach of any covenant is a forfeiture of the whole obligation. Br. Covenant, pl. 47. cites 10 H. 6. 23.

(S. a) Qualified or relieved in Equity.

1. **THE** bill is to be relieved against the forfeiture of a lease, in which there is a covenant; *that if the lessee should let the premises for any longer than three years, except to the wife or children of the said lessee, without licence of the lessor or his assigns first had, then the said lease to be void*; that the defendants have entered upon the premises, on pretence that the executors of the lessor did alien the same to the plaintiff without licence, and have ousted the plaintiff who purchased the same; this Court on reading precedents, forasmuch as the said *executors sold the lease for payment of debts to which the same was liable*, and if she had not been executrix there had been no forfeiture. This Court decreed the plaintiff to be relieved against the said forfeiture. Chan. Rep. 170. 1656. Cox v. Brown.

2. Covenant to perform articles for the *settling of lands of which the covenantor had no possession*, but only a *possibility of descent*, after a descent decreed to be settled. Chan. Rep. 158. 21 Car. 1. Wiseman v. Roper.

3. *Breach of covenant*, though proved to be *much to the advantage of the covenantee*, yet no relief in chancery, though it was urged that the penalty was excessive, beyond that of a bond of double the value; 2 Chan. Cases. 198. Trin. 22 Car. 2. Blake v. the East India Company.

Fin. Rep.
117. S. C.
and no relief.

4. A. sells a parsonage and *covenants against his own acts*, but there was likewise a covenant that he *had good and lawful power* to grant and convey the premises to the said vendee, and his heirs, which was contrary to the true intent of the parties; decreed that the general words ought not to oblige the plaintiff, being *contradicted by all the subsequent covenants*, and the plaintiff selling only such an estate as he had. Fin. R. 90. Hill. 25 Car. 2. Feilder v. Studeley.

But where a ground rent was reserved on a lease and the lease was assigned over by way of mortgage to A. for 100l. A. never entered and lost 100l. mortgage money, but was sued by the lessor for the ground rent. A. brought a bill for relief but it was dismissed, the mortgage being by way of assignment, and not by way of underlease. 2 Vern. 374. pl. 336. *Pilkington v. Shallor*.

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The Court observed that the covenant was like-
wise that the premises should be held and enjoyed pursuant to the uses limited, which latter covenant being executory, was the stronger as it might afford some pretence for a specific execution thereof.

But upon the whole his lordship thought the latter covenant was to be construed as relative to and dependant upon the former and to be restrained by that, and to have meant no more than that the father should not by suffering a recovery, prevent the premises from being enjoyed according to the said limitations. Wms. Rep. 104. 108. S. C.

5. A. assignee by way of a mortgage of a lease for years of a house with covenant to repair. A. was never in possession. Per Cur. it was A.'s folly to take assignment of the whole term and so subject himself to the covenants in the original lease; yet as he is only a mortgagee and never was in possession; the Court dismissed the bill, and left the plaintiff to recover at law, as well as he can; per Commissioners. Mich. 1692. 2 Vern. R. 275. *Sparks v. Smith*.

6. Tenant in tail by deed covenants in the same deed, *not to dock the entail or suffer a common recovery*, he has only one child, a daughter, to whom he gave a good portion on marriage, he suffers a common recovery and by will devised the estate to his daughter for life, and to her first &c. sons in tail, and if she survived her husband she should have it in fee to her and her heirs, on bill by the daughter and her husband, for the specific execution of the covenant it was insisted for the plaintiff that the agreement was executory, and like a covenant, that a man would not execute a power, as in the Lord Peterburgh's Case, the 15 leases set aside per Cowper C. this case differs for there was an agreement (subsequent to the raising of the power) to extinguish it but here all is in the same deed, so you knew his power and therefore accepted a covenant, by which to have damages. 2 Vern. 635. Hill. 1708. *Collins v. Plummer*.

7. But where tenant for life with power to make leases, covenanted in a subsequent deed not to make leases, yet afterwards executed his power, the court of chancery set aside the leases; but the reason was as Lord Chancellor observed in the Case of *Collins v. Plummer*, that this was an agreement subsequent to the raising of the power, to extinguish it whereas in *Collins and Plummer's Case*, the covenant was in the deed. 2 Vern. 635. and Wms. Rep. 105. 107. cites it as Lord Peterborough's Case.

8. A. the father of M. (a feme sole) mortgaged land for raising part of a portion on her marriage with J. S. and afterwards died, leaving only M. his heir. M. afterwards joined with B. in a fine and by deed declared the uses to her husband and self, and the heirs male of the body of the husband. The mortgagee calling in his money, J. S. joined with M. in an assignment of the mortgage and covenanted that he and his wife or one of them would pay the money. J. S. died leaving W. S. his son

son by M. and after M. inter-married with W. R. and died. Lord C. Cowper decreed that the *personal estate of J. S. shall not go in case of the mortgaged premises*, the debt being originally A.'s and continuing so to be, the *covenant, upon transferring the mortgage, was an additional security for satisfaction only of the lender*, and not intended to alter the nature of the debt, Wms's. Rep. 347. Pasch. 1717. Bagot v. Oughton.

9. So that it seems as the reporter observes, *if a feme sole mortgages and receives the money, and an after husband joins in assigning the mortgage and covenanting to pay the money, and dies; his personal estate shall not be liable to the payment; secus if the husband had received the money*, Ibid. 348.

10. *Breach of covenants is triable at law*, for equity will not settle damages. MS. Tab. March 17th 1719. Stafford v. Mayor of London.

For more of Covenant in general, See *Action* (M. c. 3.) *Condition. Debt. Estate. Grants* (H. 7.) and other proper Titles.

Covin.

[473]
Fol. 549.

(A) [Discountenanced in Law.]

[1. IF a man that has a right of action to certain lands by covin, causes another to oust the tenant of the land, to the intent to recover it from him, and he recovers accordingly against him by action tried, yet he shall not be remitted to his ancient right, but is in of the estate of him who was the ouster, † 41 Aff. 28 Curia. Adjudged, and assise lies against him, † 44 Aff. 29.]

* Covin is a secret assent determined in the heart of 2 or more men to the prejudice of another, per Montague Ch. J. Pl. C. 54. b. in Case of *Wimbish v.*

Talboys. — 9 Rep. 109. b. in *Merial Tresham's Case*. — Arg. and 110. a. S. C. cited per Cur. — Co. Litt. 357. a. b. — S. C. cited Sid. 21. in pl. 3. — But *fraud* may be by one alone. 9 Rep. 110. b. per Curiam.

† Br. Remitter pl. 46. cites S. C. — Br. *Falsifier de Recovery*, pl. 40. cites S. C. — See tit. Remitter (C) pl. 1. S. C. and the notes there. — S. C. cited 3 Rep. 78. a.

† Br. *Falsifier de Recovery* pl. 43. cites S. C. — S. C. cited 8 Rep. 133. a. — S. P. by *Clench and Gawdy*. Poph. 64. and Ibid. 100. S. P. by *Popham and Gawdy* in Case of *Goodale v. Wyatt*.

Br. Falſifier de Recovery pl. 43. cites S. C. — [2. If a man diſſaiſes me of land, to which a woman hath title of dower, of covin, and with conſent of the woman, to the intent to endow her, and he endows her in the country accordingly, yet this is of no effect againſt me, but I may ouſt him becauſe of the covin. Dubitatur, 44 Aff. 29.]

4. S. P. by Littleton, and Cur. cited. — S. C. cited 8 Rep. 132. b. — S. C. cited by Montague Ch. J. Pl. C. 54. b. — Co. Litt. 35. a. S. P. — Co. Litt. 357. b. S. P. and ſays, that ſo it is in all caſes where a man has a rightful and juſt cauſe of action, yet if he of covin and conſent does raiſe up a tenant by wrong, againſt whom he may recover, the covin ſuffocates the right, ſo as the recovery, though upon good title, ſhall not bind or reſtore the demandant to his right. But if a diſſeiſor, abator or intruder do endow a woman that has lawful title of dower, this is good and ſhall bind him that has right, if there was no ſuch covin or conſent before the diſſeiſin, abatement or intruſion. — Br. Dower. pl. 59. cites 12 Aff. 20. S. P. — Br. Aſſiſe pl. 181. cites S. C. & S. P. accordingly. — Br. Damages pl. 96. cites S. C. & S. P. — Fitz. Dower pl. 42. cites Hill. 24 E. 3. 46. S. P. — Perk. S. 394, 395, 396. — 3 Rep. 78. a. S. P. per Cur. in Fermor's Caſe, and cites ſeveral year books, and D. 295. For though her right be lawful and ſhe has purſued her recovery by Judgment in the King's Court, yet the ſaid covin makes all illegal and tortious though recoveries, and eſpecially where they are upon good title are much favoured in law.

Br. Falſifier de Recovery, pl. 43. cites S. C. — [3. The ſame law, though the endowment was upon a recovery againſt him in a writ of dower, becauſe of the covin. 44 Aff. 29.]

Br. Dower pl. 15. cites 44 E. 3. 46. S. P. and Ibid. pl. 59. cites 12 Aff. 20. S. P. admitted. — Br. Aſſiſe pl. 181. cites S. C. and S. P. admitted. — Br. Damages, pl. 96. cites S. C. and S. P. admitted. — S. C. cited 8 Rep. 33. a.

4. A reſignation by an abbot by covin ſhall not abate the writ. 3 Rep. 78. b. cites 4 E. 2. Cui in Vita 22.

5. An eſtate is made to the king and by letters patents granted over, and all this by covin between him that granted to the king and the patentee, to make an evasion out of the Statute of Mortmain, ſhall not bind but be repealed. 3 Rep. 78. b. cites 17 E. 3. 59. and 21 E. 3. 46.

Br. Treſpaſs pl. 26. cites S. C. — [6. The buying goods in a market overt, by covin does not alier the property. Br. Colluſion &c. pl. 4. cites 33 H. 6. 5.]

— Pl. C. 46. cites S. C. and that the plea of covin was admitted good without ſhewing any thing of the covin ſpecially. — S. P. per Cur. 3 Rep. 78. b. — S. P. admitted per Cur. Cro. E. 86. pl. 6. Hill. 30 Eliz. B. R. in Caſe of Wikes v. Morefoots. — 2 Inſt. 713. S. P.

[474] S. C. cited Sid. 21. per Cur. 7. A woman and her huſband as adminiſtrators of the firſt huſband, recovered a debt, and while that ſuit was depending, the ſon of the inteflate by covin between him and the defendant, procured new letters of adminiſtration to him and his mother jointly, and after judgment reſeaſed to the debtor; the huſband and wife ſued execution, the debtor brought an audita querela, hanging which the 2d adminiſtration was repealed per ſentence, and the covin and the repeal pleaded in bar, and upon demurrer judgment was againſt the plaintiff in the audita querela. D. 339. pl. 46. Hill. 17 Eliz. Anon.

8. Covin is always to the prejudice of a third perſon; per Wray. Le. 180. pl. 255. Trin. 31 Eliz. B. R. in Caſe of Fiſh and Brown v. Sadler.

9. The

9. The common law so abhors fraud and covin, that *all acts as well judicial as others*, and which of themselves are just and lawful, yet *being mixt with fraud and deceit, shall in judgment of law be tortious* and not lawful; quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur. 3 Rep. 78. a. Hill. 44 Eliz. in Fermor's Case.

10. A. disseisor enfeoffs A. with warranty, and the disseisor afterwards with others procures B. to disseise A. and that C. who has an elder right and cannot enter, shall bring a scire facias against B. to execute a fine levied to him; by which means A. is to lose his warranty; for upon the scire facias no voucher lies; all this is done accordingly, and judgment is given for C. against B. A. upon this covin may well maintain a writ of conspiracy in the nature of an action upon the case against the disseisor and the other conspirators, and the judgment in the scire facias shall be avoided; and this action upon the case shall avoid it for the vexation and falsehood, and loss of warranty. Resolved by the Council, Understand this regularly by all the Judges of England. The remedy for C. is, he may have a scire facias against A. now the terretenant; if the fine was not executed and pending this scire facias, A. shall bring a warrantia chartæ against the disseisor, and so the right of every one shall be saved. Jenk. 49. pl. 94.

11. Tenant in tail discontinues and dies, his heir within age; a stranger by covin disseises the discontinuer, and enfeoffs the infant within age; the infant is not remitted, although he knew nothing of the covin. By all the Judges of England. Jenk. 193.

12. Tenant in tail who has a wife makes a feoffment and dies; the feoffee is disseised to the intent that the disseisor shall endow the wife; this dower is worth nothing because of the covin. Jenk. 193.

3 Hill. 44 Eliz. in Canc. in Fermor's Case. — Co. Litt. 35. a. S. P. For covin in this case shall suffocate the right that appertained to her and so the wrongful manner shall avoid the matter that is lawful. — Co. Litt. 357. b. S. P. — 5 Rep. 31. a. S. P. — 6 Rep. 58. a. S. P. obiter. — 3 Rep. 130. b. 133. a. Arg. cites 44 E. 3. 45. b.

13. Debt is brought by a woman administratrix; she has judgment; before execution this administration is revoked by covin, and committed to the said woman and her son; the son releases the debt; the woman sues execution; the debtor brings an audita querela; it does not lie because of the covin. Jenk. 285. pl. 17.

14. The plaintiff, a woman, who had 150l. given her by her brother, the defendant, upon her marriage, gives a bond privately to her brother to repay the said money; the husband being dead without issue, the defendant sued the bond at law upon the plaintiff; whereupon she preferred her bill here to be relieved against it, being a fraud, by reason it was done without the privity of her husband. It was urged for the defendant, that it was

good reason for the husband, or any of his issue, to be relieved, in case they had been concerned, but that there was no reason that the woman herself, who gave the bond, should be relieved. But ordered that the bond should be delivered up; for being once a fraud, no accident of death or course of time should alter the case; and the *plaintiff was relieved notwithstanding it was her own agreement, being done in fraud of the husband.* 2 Freem. Rep, 101. pl, 111, Mich. 1687, Gay v, Wendow,

(A, 2) What Person or Persons may do it.

Br. Collu-
sion &c. pl. [1. COVIN *cannot be but between two.* 39 H, 6. 19. b.]
23 cites
S. C. — S. C. cited 9 Rep. 109. b. — S. C. cited 6 Rep. 58. 2.

Ibid. 54. b. 2. Covin may be *upon good title*; as where a feme had for her jointure estate tail with warranty, and had been impleaded by S. P. per Montague Ch. J. cites action upon good title, and by covin had *confessed the action*; it is within the 11 H. 7. 20. For though the title of the action is good, yet if she had vouched and recovered in value, this recovery in value would go in benefit of the issue in tail, which is now lost by the covin. Per Hales. J, Pl. C. 50. b. Mich, 4 E. 6. Wimbish v. Talboys.

(B) What Things may be averred to be upon Collusion, Records.

Fitzh. Brief [1. IF a recovery by a stranger, pending the writ, be pleaded in
pl. 533. abatement, the demandant cannot aver it to be by covin
cites S. C. between the tenant and the stranger. 41 E. 3. 11.]
— In

dower the tenant said that he himself disseised J. N. who re-entered pending the writ, Judgment of the writ; and a good plea; the demandant said that J. N. entered by covin to abate the writ; and no plea; for where this entry is lawful, it cannot be by covin. Br. Collusion &c. pl. 20. cites 15 E. 4. 4. — S. C. cited 8 Rep. 139. b. as held, because the entry is lawful and mixed with no tort. — S. C. cited Pl. C. 43. b. 44. a. as held by the opinion of the whole Court that the demandant cannot have such general averment of covin without cause shown. — Ibid. 48. a. S. C. cited accordingly; for as the demandant had not denied the title of J. N. such averment of covin is repugnant to the thing confessed.

2. Formedon was brought by covin of the tenant against himself, because he was *feoffee upon condition, and had broken the condition, and would have the land to be lost against the feoffor*, and this matter was alledged by feoffor who was a stranger to the action; for the defendant confessed the action, and thereupon proclamation was made, if any one could say any thing why the demandant should not have judgment and execution? whereupon the feoffor came in as above, and shewed as above, and the matter was examined and confessed, and the tenant put to give bail to attend his punishment for the deceit. Br. Collusion &c. pl. 15. cites 7 H. 4. 19.

3. In

3. In an action personal collusion shall not be enquired, nor in *quowry*, nor in writ of entry at the common law, per Frowike quod Kingsmill concessit; and said, that in *quare impedit*, the collusion shall be enquired, and so in *assise*. Br. Collusion, pl. 48. cites 10 H. 7. 3.

4. In all cases where averment of covin or other thing is given by statute or common law, there a man shall aver it generally where there can be no special cause of it, but where there may be a special cause, there the averment must be special; per Mountague Ch. J. Pl. C. 55. Mich. 4 E. 6. *Wimbish v. Talboys*, [476] 9 Rep. 110, Tresham's Case.

5. Covin shall never be intended or presumed in law unless it be expressly averred; resolved. 10 Rep. 56, Trin. 11 Jac. in the Chancellor &c. of Oxford's Case.

(C) In what Case the ordinary Course shall be changed by Covin.

[1. * 39 H. 6. 50. A Man comes by habeas corpus out of London, and had no cause to have the prison but by his covin, it was ordered, that he should be in execution till he had paid the debt recovered against him after the writ brought, and that after he should be remanded to answer the plaints there. A judgment shall be stayed for collusion. † 7 H. 4. 19. b.]

* The case was that a man came out of London into C. B. by privilege, by suit against him

in bank, and it appeared by examination that he was arrested in London in the vacation when he need not come about his suit in Westminster; and therefore the opinion of the Court was that he should be remanded, and therefore the plaintiff in C. B. prayed that he might first answer to his suit there when he was present, and the count was in debt of 20 l. and the defendant as to 40 s. confessed the action, and to the rest pleaded another plea, and judgment was given of the sum confessed and 4 s. damages. Layton said, the action in bank is taken by covin of the defendant, and he confesses part to be committed to the fleet, and so to be dismissed in London; and then the plaintiff here will release the condemnation here to him, and pray to examine the covin; for it is not any duty between the now plaintiff and the defendant in this Court, and for the suspiciousness Prior awarded the defendant to the Fleet for the condemnation confessed, and when that is satisfied, keep him for the plaint in London; for when he has satisfied this plaintiff he shall be remanded into London. And so see that the covin shall not aid him; for he thought by the committing to the Fleet to be discharged in London, and so ars deluditur arte, for fraus pemine debet petrocinari &c. Br. Privilege, pl. 31. cites 39 H. 6. 50.—Br. Collusion &c. pl. 24. cites S. C.

† Br. Collusion &c. pl. 15. cites S. C. —Br. Judgment pl. 18. cites S. C. —Fitzh. Proclamation, pl. 14. cites S. C. —Br. Proclamation, pl. 2. cites S. C.

[2. If land be aliened pending a writ of debt by covin, to avoid the extent thereof for the debt, yet when the covin appears upon the return of the elegit by the sheriff, the land so aliened shall be extended. D, 3, 4. Ma. 149. 80.]

This in Dyer 149. 2. pl. 80. 3 & 4 P. and M. is a quare started in

the case, and Brooke thought that upon such return by the sheriff a new writ should issue reciting it. —Ibid. Marg. cites Trin. 23 Eliz. B. R. Rows's Case who brought debt against B. as heir, who pleaded riens per descent the day of the writ, and found that before the writ brought he had aliened the assets by covin to defraud this debt, and judgment for the plaintiff; and that it is well found for him upon office of assets by descent.

[3. If a man makes a deed of gift of his goods in his lifetime by covin to oust his creditors of their debts, yet after his

The goods are liable to the creditors

dition in his death the *vendee* shall be charged for them. 13 H. 4. the vendee's hands, as 4. b.] executor of his own wrong, if the gift be fraudulent; and judgment accordingly. Cro. J. 271, pl. 3. Hill. 8 Jac. B. R. in Case of *Lawes v. Leader*.——Yelv. 196. S. C. adjudged per tot. Cur.——2 Le. 223. pl. 284. Hill. 16 Eliz. S. F. by Dyer.

4. If the *tenant in formodon* confesses the *action* by *covin* to make a third person lose his entry, *proclamation* shall be made, and if the third person comes and alleges the *covin*, the matter shall be examined, and the judgment shall stay, and the party shall be punished. Br. Formodon, pl. 22. cites 7 H. 4. 19.

[477] 5. A man was arrested in London, and after another brought *action* against him in Bank, and had him arrested by *capias* by *covin*, by which they surceased in London; for by this he is a prisoner to the bench; and the plaintiff in London prayed *procedendo*, and that the *covin* might be examined. Per Cur. we cannot examine the *covin* yet, for the *capias* is not returnable till 15 Hill. But per Littleton, if he does not come at the day, and be let to mainprise, the plaintiff in London may have a new bill against him. Br. Privilege, pl. 41. cites 10 E. 4. 16.

6. A man sued *corpus cum causa* out of London, and it was found by examination, that the *action* by which he claimed *privilege* was sued by *covin*, for the plaintiff in Bank disallowed his suit against this prisoner; for the suit was discontinued by two years, and now revived by the plaintiff and the attorney in advantage of the prisoner, where another suit was thereof taken of late time against the prisoner, by which, upon the examination of the matter, and attorney, and the plaintiff, in this Court, for their falsity, were committed to the Fleet, and were fined, and the prisoner remanded to London. Br. Privilege, pl. 43, cites 16 E. 4. 5.

7. A man had a grant of the next presentation; the church voided. A. B. presented; the grantee brought *quare impedit* and recovered, and had writ to the bishop, who returned that the grantee of A. B. had resigned, and another is in, by which the plaintiff had *scire facias* to execute the judgment though there be the two avoidances; for he shall recover upon the first avoidance, and the act of the defendant shall not prejudice the plaintiff; for then by *covin* the grant never should take effect; per Frowike Ch. J. Br. Scire Facias, pl. 141. cites 21 H. 7. 8.

8. A simple man drawn to make leases, and to enter into bonds was relieved. Toth. 268. cites Cuddington v. Hutton, in 8 Jac. fol. 905.

9. A man relieved against his own deed, the same being gotten by threats and practice, though the same be vested in an infant, and the purchaser to become bound in recognizance to assure it when &c. Toth. 268. cites Maneright v. Roberts, 10 Jac.

10. The plaintiff relieved *against his own release*, being an ignorant person. Toth. 268. cites Sumner v. Tilling. 12 Jac. II. A. fo. 49.

11. Judgment was had in a *sci. fa. against the wife upon a former judgment*, and after two *nibils* returned a motion was made to quash it, because *before the sci. fa. brought, she was married, and this writ was brought against her as sole, by the contrivance of the husband and the plaintiff*, to oppress her and lay her in prison; and it was shewn, that the plaintiff knew that she was married, and that she could have no relief either by the writ of error or *audita querela*, because the husband would release it. The Court said, they might *set aside the judgment* for this misdemeanor of the plaintiff. Vent. 208, Paich. 24 Car. 2, B. R. the Lady Prettyman's Case.

(D) Pleadings.

1. *ENTRY in the post*; the *termor for years* by the Statute of Gloucester *prayed to be received by default of the vouchee*, and said, *that the recovery was by covin between the demandant and the tenant who leased to him &c. to make him lose his term, and traversed the disseisin*; and per Pollard and Fitzherbert J. clearly, the *covin* is not material without traversing the point of the writ; and therefore the *covin* alledged, and the *traverse of the disseisin* is not double; quod nota; for he is compelled of necessity to speak of both, and therefore it is not double; quod nota. Br. Double, pl. 55. cites 14 H. 8. 4. [478]

2. *Covin is not traversable by plea*, but only in evidence at the bar. Winch. 90. Trin. 22 Jac. C. B. Adams v. Ward.

For more of Covin in General, See *Fine* (E. b. 3) (I. b. 4) *Fraud. Payment. Remitter*. And other Proper Titles.

Counsellor.

(A) Considered ; How ; And in what Cases favoured or not.

1. **T**HE fees to counsellors are not in nature of wages, or pay, or that which we call salary, or hire, which are duties certain, and grow due by contract for labour or service, but *what is given him is honorarium, not merces*, being a gift which gives honour as well to the taker as the giver; nor is it certain or contracted; for no price or rate can be set upon counsel which is invaluable and inestimable, so as it is more or less according to the circumstances, namely, the ability of the client, the worthiness of the counsellor, the weightiness of the cause, and the custom of the country. It is a gift of such a nature, that the able client may not neglect to give it, without ingratitude, for it is but a gratuity, or token of thankfulness; yet the worthy counsellor may not demand it without doing wrong to his reputation, according to that moral rule, *Multa honesta accipi possunt quæ tamen peti non possunt*. Pref. to Dav. Rep. 22, 23.

2. 5 Eliz. cap. 14. s. 15. Counsellor not punishable for pleading, or shewing a false deed in evidence, to the forging whereof he was not party nor privy.

Ibid. cites
6 Car.
Thimble-
thorp v.
Thimble-
thorp, S. P.

3. The counsel of the party's cause not to be examined in the same cause. Toth. 110. cites 11 Eliz. Lee v. Mark-harm.

4. The counsellor's clerk not to be examined in the cause, Toth. 110. cites 13 & 14 Eliz. fo. 93. Breame v. Breame.

[479]

5. Daniel Hill having put in for his client a long insufficient demurrer to a bill exhibited against his client, in which supposed demurrer were many matters of fact, and other things frivolous and vain, the Lord Chancellor Egerton awarded 5l. costs against the party, and ordered that neither bill, answer, demurrer, nor any other plea, should from thenceforth be received under the hand of the said Hill, Cary's Rep. 38. cites 27 April. 1 Jac. Hill's Case.

If a coun-
sel speaks
scandalous
words a-
gainst one in
defending
his client's
cause, an
action lies

6. A counsellor in law retained, has a privilege to enforce any thing, which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false; but it is at the peril of him that informs him; for a counsellor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in question, otherwise action upon

upon the case lies against him by his client. Per Popham Ch. J. and judgment accordingly. Cro. J. 90. pl. 18. Mich. 3 Jac. B. R. Brook v. Mountague.

7. But *matter not pertinent to the issue* or the matter in question, he need not to deliver; for he is to discern in his discretion what he is to deliver, and what not; and although it be false, he is excusable, being pertinent to the matter. Cro. J. 90. pl. 18. Mich. 3 Jac. B. R. in Case of Brook v. Mountague.

8. But if he *gives in evidence any thing not material to the issue which is scandalous*, he ought to aver it to be true, otherwise he is punishable; for it shall be intended as spoken maliciously and without cause; which is a good ground for an action. Cro. J. 9. pl. 18. Mich. 3 Jac. B. R. in Case of Brook v. Mountague.

9. So if a counsellor *objects matter against a witness which is scandalous*; if there be cause to discredit his testimony, and it be pertinent to the matter in question; it is justifiable what he delivers by information, although it be false. Cro. J. 91. pl. 18. Mich. 3 Jac. B. R. in Case of Brook v. Mountague.

sermon at Lincoln, being the 3d sermon ad magistratum, pag. 164, is viz. Not to think because he has the liberty of the Court, and perhaps the favour of the Judge, and that therefore his tongue is his own, and he may speak his pleasure to the prejudice of the adversary's person or cause; and not to seek preposterously to win the name of a good lawyer, by wresting and perverting good laws; or the opinion of the best counsellor, by giving the worst and the shrewdest counsel; and not to count it, as Protagoras did, the glory of his profession, by subtilty of wit, and volubility of tongue to make the worse cause the better; but like a good man, as well as a good orator, to use the power of his tongue to shame wit and impudence, and protect innocency, to crush oppressors and succour the afflicted, to advance justice and equity, and to help them to right that suffer wrong, and to let it be as a ruled case to him in all his pleadings, not to speak in any cause to wrest judgment.

10. Counsel may take fees of his client, but he may not *lay out money* for him, and if he does, Hobart Ch. J. doubted what remedy he might have. Winch. 53. Mich. 20 Jac. C. B. Gage v. Johnson.

11. Counsellor brought a *bill for fees, due to him from the defendant* being a solicitor, and was to account with him at the end of every term; the defendant demurs. Demurrer was allowed and the bill dismissed. Chan. Rep. 38. 15 Car. 1. Moor v. Row.

12. A lawyer who was of counsel may be *examined upon oath as a witness to the matter of agreement, not to the validity of an assurance, or to matter of counsel*. Mar. 83. pl. 136. Pasch. 17 Car. Anon.

13. If a counsellor *says to his client that such a contract is simony*, and the client says he will make it, simony or not simony; and thereupon the counsellor makes this simoniacal contract, it is no offence in him. Per Reeve J. Mar. 83. in pl. 136. Pasch. 17 Car. Anon.

14. A counsel was examined as a *witness to prove the death of a person*, yet he is not bound to answer to other things which

not against him for so doing; for it is his duty to speak for his client and it shall be intended to be spoken according to his client's instructions. Per Glyn Ch. J. Sty. 46s. Mich. 1655. B. R. Wood v. Gunston.

The advice of that great and valuable man Bishop Sanderson, to the pleader viz. Counsellor, in his assise.

which may disclose the *secrets of his client's cause*. Per Roll. Ch. J. Sti. 449: Pasch. 1655. Waldron v. Ward.

15. *Costs* were taxed for scandal in a *bill in chancery* at 100*l*. but though the scandal was very great, yet my Ld. Chan. and the Judges reduced it to 50*l*. and the counsellor, whose hand was set to it, to pay the defendant 5*l*. more. Chan. Rep. 194. 12 Car. 2. Emerson v. Dallison;

[486] 16. Bill by executors of a counsellor for *a sum in gross for advice and pains* of their testator in several causes, wherein defendant was concerned, defendant *demurred* because if he should answer the bill it would draw him under a penal law; it being against the course of all courts of justice for any counsellor at law to make such contract as in the bill is suggested for his *fees in a gross sum* to be paid upon the event of any cause. Therefore this is a bill of such a nature as ought not to have any countenance in a court of equity; demurrer allowed. Fin. R. 75: Hill. 25 Car. 2: Penrice v. Parker.

17. What a counsellor *knows only* as counsellor, and under a contract of silence, he shall *not be put to answer*. Chan. Cases. 277. Trin. 28 Car. 2. Bulstrode v. Lechmore.

18. Contra, where it is to discover a settlement in *trust for payment of debts*. 2 Chan. R. 29. Shalmer v. Tresham.

Ordered that he be not examined on any matter in which he was of counsel either by indifferent choice of both parties, or with either of them, by reason of any annuity or fee. Cary's Rep. 143. in Case of Dennis v. Codrington. — It is against the duty of a counsellor to discover the evidence, which he who retains him, acquaints him with; admitted by Hale Ch. J. Vent. 197. Pasch. 24 Car. 2: B. R.

19. The bill was to *discover an ancient bill of entail; supposed to be in the defendant's hands, and that he had perused it, and that in discourse he had acknowledged such deed and other like charges*. The defendant *says by plea* that he was a counsellor with A. B. That on a reference between the parties, it was agreed that nothing that passed then should be made use of on either side, or be disclosed. Chan. Cases. 277. Trin. 28 Car. 2. Bulstrode v. Lechmore.

20. A counsel may be a *witness* if he voluntarily agreed to depose the truth, but he is not compellable so to do (though it has been held otherwise formerly); by three Judges contra Holt resolved. Cumb. 467, 468: Hill. 10 W. 3. B. R. Matthews v. Temple.

21. In the case where Mr. M... formerly an attorney of the Court (now counsellor at law), was accused of *foul practices* in his profession; the Court said, *though he be now a counsel, yet perhaps that will not discharge him from being an attorney still*; and then we may get his demands taxed as such. And does any body think, but that a counsellor at law is a kind of a minister of justice, and right, and as such, punishable for misbehaviour in his profession? And Holt Ch. J. said to him, will you have the point tried whether a counsellor at law may commit an extortion? 6 Mod. 137. Pasch. 3 Ann. B. R. Anon.

22. One Mr. Dean, who was a barrister at law, having made a bill as a solicitor, a motion was made to tax it, which was granted, but the Court said that if he insisted upon having his bill paid, they would hereafter treat him as a solicitor; and Mr. Justice T. Powys said, that so it was ruled in Chancery by my Lord Chancellor Harcourt, in the Case of one Mr. Alston; and if gentlemen would not take fees after the usual manner, they ought not to recover them by any action at law. Hill. 12 Ann. B. R.

23. Notwithstanding counsellors are not officers of any court, nor invested with any judicial office, but barely practise as counsellors; yet inasmuch as they have a special privilege to practise the law, and their misbehaviour tends to bring a disgrace upon the law itself; it seems clear that they are punishable for any foul practice as other ministers of justice are. 2 Hawk. Pl. C. 151. Cap. 22. s. 30.

24. It is certain, that no counsellor or attorney can justify the using any deceitful practice, in maintenance of a client's cause, and that they are liable to be severely punished, for all misdemeanors of this kind, not only by the common law, but also by statute; for it is enacted by *Westm. 1. cap. 28.* That if any serjeant, pleader, or other, do any manner of disceit or collusion in the King's Court or consent unto it, in disceit of the Court, or to beguile the Court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that Court for any man. And if he be no pleader, he shall be imprisoned in like manner by the space of a year and a day, at the least. And if the trespass require greater punishment, it shall be at the king's pleasure. In the construction of this statute the following points have been holden: 1st, That counsellors &c. who are not sworn, are as much within the meaning of it as serjeants &c. who are sworn. 2dly, That all fraud and falsehood tending to impose upon or abuse the justice of the king's courts are within the purview of it. Hawk. Pl. C. 254. cap. 83. s. 28, 29, 30. [481]

For more of Counsellor in General, See other Proper Titles,

(A) Counterfeits.

(A) Counterfeits.

3 Inst. 133. cap. 60. says, that here it is to be observed, that upon this statute for this offence, the offender cannot be fined, but corporal punishment only inflicted. — But where T. was indicted upon this statute, because he by a false note in the name of J. D. obtained into his hands a wedge of silver of 500 l. value, of which he was found guilty, and had judgment to stand on the pillory, and also to pay a fine to the king of 500 l. and to be imprisoned during the King's pleasure; and to be bound with sureties for his good behaviour. Cro. C. 564. pl. 10. Mich. 13 Car. B. R. Terry's Case.

1. 33 H. 8. ENACTS that obtaining money by any false token or counterfeit letters, and being convicted thereof by witnesses or confession before the Lord Chancellor, Justices of Assize, Justices of the Peace, or by any action in any Court of Record, shall be punished at discretion, the pains of death only excepted.

2. An estate that is to be devised on condition of payment of 100 l. cannot be devised by a sham payment of part, and real payment of part, but there must be a real payment of the whole. Cro. E. 383. pl. 4. Pasch. 37 Eliz. B. R. Goodale v. Wiatt.

Cro. J. 471. says it was brought by the vendee. — S. C. cited per Doderidge J. as brought by the Clothier. Poph. 144.

3. A clothier of G. made cloths which were dearer and more vendible than the cloths of any other, and he put a special mark upon them; another clothier counterfeits the said mark and puts it on his cloths which were not so good, but yet sells them as dear as the other; action on the case lies against him; Doderidge J. says it was adjudged 23 Eliz. in C. B. but says, not whether the action lay for the clothier or the vendee, but it seems to be for the vendee. 2 Roll. Rep. 28. Trin. 16 Jac.

If an information lies for counterfeiting a letter, sending for a person in another's name to Brentford to come to him, when no mischief is done or intended? Court divided. 2 Show. 20. pl. 13. Mich. 30 Car. 2, B. R. the King v. Emerton.

For more of Counterfeits in General, See other Proper Titles.

Countermand.

Countermand.

(A) What is or amounts to a Countermand; And of what it may be.

1. **I**F A. gives me 20*l.* to dispose for his soul after his death, A. shall not have debt nor account, for this amounts to a gift as it seems; per Needham. Br. Done &c. pl. 52. cites 8 Ea. 4. §.

2. Money given to bestow in charity may be countermanded till bestowed. D. 22. pl. 135. Trin. 28 H. 8.

3. There is a diversity where such gift is made to a stranger to deliver over of his mere will and pleasure, as a new year's gift &c. or on a consideration of former duty, or in satisfaction of another thing. D. 49. pl. 9, 10, 11. Pasch. 33 H. 8. in the Case of Lyte v. Penny.

4. Money bequeathed to A. by B. ad opus & usum C. yet till the delivery to C. the property continues in A. and he may countermand it. D. 49. b. pl. 14, 15.

¶ Roll. Rep. 40. S. C. cited. — Cart. 142. S. C. cited Arg.

But if it be solvend. to C. which is intended satisfaction

of a debt it is not countermandable; agreed. Arg. Cro. J. 687. pl. 2. Trin. 22 Jac. B. R. Harris v. Bevoire; — a Roll. R. 440. S. C.

5. A. purchased 5 marks per annum in the name of B. and C. with this trust, that A. might enjoy it during his life, and after it should be to the erecting of a school in the town where the said A. was born and buried, as the feoffees declared in their answer; and in his life-time, after the purchase, he repeated his intent of converting the same to the use of the school, and devised the same to J. S. which Justice Warburton presently decreed for him, saying his will was his declaration. But in his words there was but a meaning only expressed (me contradicente) for if J. C. make a feoffment to the use over according to articles annexed, he cannot alter the same by a latter will, contra if it be to the use of his will. Cary's Rep. 40. 41. cites 19 June, 1 Jac. Littleton's Case.

6. A. being indebted to B. in 100*l.* bails 100*l.* to C. to pay B. yet before payment A. may countermand it. For, A. himself may have paid it afterwards. D. 49. a. Marg. pl. 10. cites Mich. 4 Jac. in Scacc. Turbeville v. Porter.

7. If I say to you, build for me such a house and I will give you 10*l.* and before you have provided materials, or have been at any charge, I will revoke my promise, and countermand my present agreement, it is not good; for meum est promittere,

S. P. per Doderidge J. but per Haughton J. contra;

but Haughton said, it may be considered in damages.

promittere, & non demittere; per Croke J. 2 Roll. R. 39. in Case of Winter v. Foweracres. — So where it was to take a journey to London and help to find a will, and before any thing provided for the journey of the defendant, it was accorded and agreed betwixt plaintiff and defendant, that plaintiff should be discharged of his journey, and defendant of payment, judgment was for the plaintiff; but it seems, if the matter had been well pleaded it would have been adjudged for the defendant. See Cro. J. 620. (bis) pl. 10. Mich. 18 Jac. B. R. Trefwaller v. Keyne.

[483] 8. But where it is *by way of contract* is is not countermandable. 2 Roll. R. 39. Trin. 16 Jac. B. R. per Doderidge and Croke Justices, in Case of Winter v. Foweracres.

9. Defendant *promised* the plaintiff, *that if plaintiff would procure a feme imprisoned to be delivered out, he would repay him all such monies as he should disburse therein.* Defendant pleaded, that before the plaintiff had paid any money for her delivery; and before the plaintiff had done any thing relating to it, he revoked his promise, and countermanded the plaintiff, that he should do nothing as to her delivery. Adjudged by 3 Justices that he could not countermand it. 2 Roll. Rep. 39. Trin. 16 Jac. B. R. Winter v. Foweracres.

10. *The law respects matters of profit and interest largely, but of pleasure, skill, ease, trust, authority, and limitation, strictly; and therefore these may be countermanded, but so cannot the other.* See Fin. 8. b. Wing. Max. 376 to 381, &c.

Vent. 186. 11. *A feme sole infeoffed a man within the view, and directed him to enter without other livery. They intermarry before any entry made by him, and then he enters; adjudged that the entry was good after marriage, and not countermanded by the marriage.* 2 Lev. 34 Hill. 23 & 24 Car. 2. B. R. Parsons v. Pierce. But says, that perhaps it might be otherwise had she married a stranger.

Parsons v. Perus, S. C. resolved accordingly. — Mod. 91. pl. 59. Parsons v. Perus, S. C. a stranger. States it, that the feme was jointenant in fee with another, and adjudged that the entry was good. — 2 Keb. 872. pl. 29. S. C. adjournatur. Ibid. 880. pl. 57. S. C. adjudged accordingly. — 3 Salk. 165. Parsons v. Pettit, S. C. accordingly. — Pollexf. 45. S. C. argued and adjudged.

12. A man gives a *warrant of attorney* to confess a judgment, and dies before the judgment is confessed; this is a countermand. Vent. 310. in a Nota. Pasch. 29 Car. 2. B. R.

13. A. *possessed of an office for two lives executes a deed, appointing, that after his death one R. H. then in his office should be deputy, and directs several annuities to be paid out of the office. Afterwards A. by a subsequent deed made different appointments of the profits of the office. A. kept both deeds in his own custody during his life; and in support of the first deed it was insisted, that it was an absolute disposition of the profits of the office without any power of revocation; and ought to stand, and that though both deeds were all along in his custody, yet so (generally) voluntary settlements are, and yet the first should prevail.* But Lord Chancellor held, that

that the *first deed was only an authority*, and therefore clearly countermandable by the second, and decreed the first deed to be delivered up. Wms's. Rep. 101. Mich. 1707. Young v. Cottle.

14. Though a *letter of attorney* is revocable at common law, yet where it *concerns payment of debts* it shall be continued in *equity*. G. Equ. R. 70. Pasch. 9 Ann. in Case of Hungerford v. Hungerford.

For more of Countermand in General, See *Marriage* (H) *Powers*. And other Proper Titles.

Court.

[484]
Fol. 523.

(A) Office of the Court.
[Or what the Court may adjudge without being found by Jury, pl. 1, 2.]

[1. **W**HAT shall be said a *reasonable time*, shall be adjudged by the discretion of the Justices before whom the cause depends. Co. Lit. 56. b.]

S. C. cited by Hide J. Mod. 139. — S. P. admitted as to removing hay ricked by licence on the land of another. Godb. 28a. pl. 401. Hill. 17 Jac. B. R. Webb v. Paternoster. — a Roll. Rep. 143. 152. S. C. & S. P. agreed. — Poph. 151. S. C. & S. P. resolved. — Palm. 71. S. C. & S. P. adjudged that the plaintiff had convenient time.

[2. What shall be said a *reasonable * fine, custom, or service*, shall be adjudged by the discretion of the Justices before whom the cause depends, upon the true state of the case depending before them; for reasonableness in these cases appertains to the conscience of the law, and therefore to be decided by the Justices. Co. Lit. 56. b. 59. b.]

* Resolved accordingly, that it may be either on demurrer or on evidence to the jury upon confession or proof of the annual value of the land. 4 Rep. 27. b. pl. 16. Mich. 42 & 43. Eliz. B. R. Hubbard v. Hammond. — S. C. cited by Hide J. Mod. 139. — Where a fine for admittance to a copyhold is arbitrable at the will of the lord, and he imposes a fine, the jury is to try whether it be reasonable or not; per Cur. Cro. E. 351. pl. 3. Mich. 36 & 37 Eliz. B. R. Jackman v. Hoddesdon. — See tit. Trial (F) pl. 5. and the notes there.

[3. If the jury find a *special verdict*, that *A. mutuo dedit 500l. to B. for which B. infeoffed A.* of certain lands, upon condition, that if he paid to him 650l. at a certain day three years after,

Bridgm. 110. S. C. and judgment in

C. B. affirmed in B. R. — Cro. J. 508. pl. 20. Mich. 16 Jac. B. R. in Case of Roberts v. Trenaine, on an usurious contract, the verdict found the agreement

prout &c. but did not find that corrupte agreement suit. It was objected, that it ought to have been found expressly to make it an offence within the statute; sed non allocatur; for there is a difference between an information, which ought to be precisely alleged, and a special verdict, wherein all the circumstances are found, which being apparent to the Court to be usurious, and cannot by intendment have any other construction, it sufficeth, and here it is apparent that the money was lent for interest, and is more than the statute permits, and therefore being usury apparent, the Court shall judge it accordingly, and cites it as adjudged in Case of *FIGGINS v. MARVIN*, that if the corrupt agreement be not expressed in the verdict, and the matter is apparent to the Court to be usury, the jury need not shew that it was corruptly, for res ipsa loquitur; but otherwise it is if it be only implied, wherefore it was adjudged for the plaintiff.

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* This should be 10 Rep. 56. b. — S. C. cited, & S. P. agreed Lev. 279. Mich. 21 Car. 2.

[4. So if the jury find special matter, [as] presumptions and circumstances, that a feoffment was made by fraud, yet the Court cannot adjudge it to be fraudulent without the finding of the jury that there was fraud, because that was matter of fact, and but evidence of fraud. Co. 10. Chancellor of Oxford, * 57. b. resolved.]

B. R. *Smith v. Wheeler*. — Mod. 38. S. C. cited, and S. P. agreed in S. C. — Vent. 128. S. P. agreed in S. C. — S. C. cited Bridgm. 112. and says, that it was so agreed in the Case of *TYRER v. LITTLETON*, in C. B. for the taking of an ox; the defendant pleaded not guilty, and the jury found, that Thomas Tyrer held certain lands of John Littleton by rent and heriot, and in the 42 of Eliz. did infeoff John Tyrer his son and heir, who made a lease to Thomas Tyrer for forty years, if he should so long live, to the intent that Joyce, whom he intended to marry, should not have her dower during his life. Thomas died possessed of the ox, and the defendant took it for a heriot, and they found the Statute of fraudulent Conveyances &c. and it was adjudged, that sofar as the feoffment was not found by the jury to be fraudulent, yet the Court could not adjudge it to be fraudulent, although the jury had found circumstances and inducements to prove the fraud. — Brownl. 96. *Trier v. Littleton*, S. C. held accordingly, per tot. Cur. for the judges have nothing to do with matter of fact. — a Brownl. 187. Trin. 10 Jac. C. B. *Tyre v. Littleton*, S. C. adjudged for the plaintiff nisi. — S. C. cited per Cur. 10 Rep. 56. a. — S. C. cited 2 Jo. 92. — S. C. cited by Bridgman. Bridgm. 112. Mich. 14 Jac.

Cro. C. 548. &c. pl. 2. S. C. & S. P. agreed by all the justices, contra Berkley, and judgment accordingly. —

Jo. 437.

438. pl. 2. S. C. & S. P. by 3 justices, contra Berkley. — Mar. 84. pl. 67. S. C. adjudged. — Fraud shall not be intended except it be expressly found. Cro. E. 291, 292. pl. 2. Hill. 35 Eliz. B. R. *Ridler v. Punter*. — See tit. Fraud (C) pl. 1. S. C. fuller in the notes there.

[5. If a jury finds, that J. S. with his own money, procured lands to settled upon himself and B. his son, being of the age of 5 years, and finds other badges of fraud, and after becomes bankrupt, but it is not found that this was done by fraud, or in trust in himself, the Court shall not intend it; and therefore the sale of such lands not lawful. Trin. 15 Car. B. R. between *Crispe and Pratt*, per Curiam agreed upon a special verdict.]

6. Where an *infant* is plaintiff in *assise*, the Court *ex officio* ought to enquire of the circumstances at large; per Hank. which was not contradicted. Br. *Assise*, pl. 59. cites 12 H. 4. 19, 20.—But see contrary for the defendant. 28 *Ass.* 511 *Ibid.*

7. In *assise*, they were at issue upon two deeds pleaded with warranty, and found for the plaintiff, and the disseisin without force and arms, and so see that it is the office of the Court to enquire of it, though it be not put in issue; but in *trespass*, if the issue should be found for the plaintiff, it shall be intended to be with force and arms, though it shall not be enquired or presented. Br. *Assise*, pl. 67. cites 7 H. 6. 40.

8. Upon a commission out of Chancery an inquisition was returned into the Exchequer upon the Statute of Fugitives, 13 Eliz. which found that Lord P. being seised in fee of divers manors &c. covenanted to stand seised to certain uses, with a proviso that he might revoke and make void the same upon the tender of a ring of 5s. value. And it was further found that Lord P. always after, till his flight beyond the sea, took the profits, and that his flight was without licence, and that he did not return according to the proclamation made. But no covin was expressly found. The Barons at first doubted, but afterwards thought that the special matter found by the jury was sufficient to inform the Court of covin apparent, and therefore they awarded a seisure of the land. Mo. 193. pl. 343. Trin. 26 Eliz. *Ld. Paget's Case.*

D. intending to go beyond sea, conveyed his land by indenture inrolled, but the bargainees were not privy to the deed till afterwards, and in it was a proviso to be void on tender of 1cs. &c. D. went

beyond sea with licence of the king, but on misbehaviour there, a privy seal was delivered to him, commanding him to return on pain of forfeiture of all his lands. Upon a commission to inquire what lands &c. D. or any other to his use had, the jury found this special matter, but found not any fraud expressly, whereupon the king exhibited his bill in the Exchequer against the bargainees &c. who truly discovered all this special matter. The Court decreed for the king. And *Warneford's Case* D. 193. and 167. [another Case] were cited, but said, that the principal case differs from them in two material circumstances which alter the law in the cases; 1st. That this is in a Court of Equity by English bill, where the judges are to adjudge upon the fraud only, and there they were in a Court of Law, and the fraud was matter of fact, which ought to be expressly found by the jury as appears by the books. 2dly. In that case the jury found expressly that the conveyance was not by fraud to deceive the king of his wardship, but only to deceive the creditors &c. whereas in the principal case there is no such negative, and therefore differs much. Lane 48. 49. Pasch. 7 Jac. in the Exchequer. The King v. the Earl of Nottingham, alias Dudley's Case. [486]

9. In *trover* and *conversion* of plate and jewels &c. if the defendant pleads *Not Guilty*, now it is good evidence *prima facie* to prove conversion that the plaintiff requested the defendant to deliver them and he refused, and consequently it shall be presumed that he has converted them to his own use, but yet this is only evidence; and if it be found by special verdict in such case that the plaintiff requested them of the defendant and he refused, this is not such matter whereupon the Court may adjudge any conversion; per Coke Ch. J. 10 Rep. 36. b. 57. a. Trin. 11 Jac. *Obiter.*

10. *Lessee for life makes a lease for years and dies within the term.* If *trespass* be brought by the first lessor against the lessee for years, he ought by his plea to set forth what day

Br. *Tresp.* pl. 368. cites 22 E. 4. 27. his

[and the cases cited in Mod. seems to be misprinted] — Cro. J. 204. pl. 6c. Hill. 5 Jac.

his lessor died, and at what place, and where the land lies, and at what day he left the possession, and so leave it to the discretion of the Court whether he did quit the possession in reasonable time or not; per Hide Ch. J. Mod. 139. Trin. 15 Car. 2. cites 22 E. 4. 18.

B. R. Stodden v. Harvey S. P. admitted as to the reasonableness of the time being to be determined by the Court.

(B) Of what Things the Court shall take Conu- fance *ex Officio*.

[1.] IN an action upon the *case upon a rescous*, if the plaintiff declares, that *A. was indebted to him by obligation in 20l. and that he sued a writ against him directed to the sheriff of Cornwall to take A. &c. and that the sheriff thereupon, 1 Oct. 6 Car. arrested him apud Launceston in comitatu Cornubiæ, and after the defendant apud Westmonasterium rescued him out of the custody of the sheriff bringing him A. towards Westminster the said 1 Oct. 6 Car. upon Not Guilty pleaded, if a verdict and judgment be given against the plaintiff [defendant] and he brings a writ of error, and assigns it for error, that (*) it was impossible he could be arrested at Launceston, and the same day be rescued at Westminster, averring that Launceston is distant from Westminster 200 miles at least; and thereupon in nullo est erratum is pleaded, by which it is acknowledged, that Launceston is so many miles distant from Westminster, yet the Court will not intend it to be impossible for him to be rescued at Westminster the same day. P. 9 Car. between Kendall and Kendall, adjudged in Camera Scaccarii in a Writ of Error upon a Judgment given in Banco Regis.]*

Cro. J. 3. pl. 2. Arg. S. P. cites 11 H. 7. 15.

4 E. 3. 13.

and D. 306. Puttenham's Case. — Cro. J. 68. in pl. 5. Pasch. 3 Jac. B. R. the S. P. per Cur. as to the Court of Chancery. — S. P. by Brampton Ch. J. Cro. and 528. Hill. 14. Car.

[487] B. R. in Case of Mounson v. Bourne. — Pl. C. 380. b. 321. a. S. P. — 4 Rep. 93. b. S. P. and cited 6 E. 4. 1. and 11 E. 4. 1. — Jo. 417, 418. pl. 5. S. C. and S. P. per Cur.

But the counties Palatine and the grand

[3. But otherwise it is of inferior courts. Co. 2. Lane 17. 2 R. 3. 9. b.]

sessions of Wales are not accounted such inferior Courts, but the Courts of Westminster shall take notice of the proceedings of those Courts. Saund. 74. Pasch. 19 Car. 2. Arg. and admitted by three justices, and cited Cro. C. 179. pl. 2. Hill. 5 Car. B. R. Griffith v. Jenkins, whereof the process of the grand sessions the Court of B. R. took notice judicially, and so Cro. E. 503. Mich. 38 Eliz. [BROUGHTON v. RANDAL] this Court took notice of the custom of Wales, to give judgment final upon a quod ei de forceat. — Sid. 331. pl. 19. S. P. per three justices. — The King's Courts cannot judicially take notice of the privileges of the cinque ports, which extend only to certain particular towns. 2 Inst. 557. But otherwise it is of a judgment given in C. B. in a præcipe of lands that lie in any of the county palatines of Chester, Lancaster and Durham, for they are exempted from the jurisdiction of the king's Courts, and within them are jura regalia, and plenary jurisdiction, and so known to the king's Courts; for they take notice of all the counties

ties in England, because they be immediate to them for direction of writs; and therefore although the tenant doth admit the jurisdiction of the Court in those cases, the judgment against him for any of such lands is void. And thus are the doubts in some books in this and other like cases fully resolved.

[4. If a *lease* be pleaded to be made by the king *under the Exchequer seal*, though this is not good by the common law, but by the custom of the Court of Exchequer, yet it is not necessary to plead or aver the custom of a court; for the *customs and courses of every of the king's courts* are as a law, and the common law takes notice of them without pleading. Co. 2 Lane 16. b. adjudged.]

S. C. cited per Cur. Cro. C. 513. pl. 9. Mich. 14 Car. 1. B. R. — S. C. cited by Bramstone Ch. J.

Cro. C. 528. pl. 6. Hill. 14 Car. B. R.

5. A man *convicted in trespass brought attaint*, and it appeared to the Court that he *had not made fine*, by which the Court ex officio sent him to prison. Br. Office del &c. pl. 13. cites 16 Aff. 4.

6. *Affise was taken* and the Justices thought that there was *error in the taking* of it, by which they *would not render judgment*. Br. Office del &c. pl. 23. cites 16. Aff. 6. and says, see 4 H. 6. 23. 35 H. 6. 24.

7. A man indicted of felony without any counsel learned in law, shewed charter of pardon disagreeing from the indictment and from his name, and the Court perceiving that the king would pardon him remanded him to ward, to purchase a better charter &c. Br. Office del &c. pl. 25, cites 26 Aff. 46.

8. *Visar general of the bishop* who has his power in his absence is no officer immediate to the Court of Bank, nor the Court will not award writ to the bishop to him in quare impedit before that it be so *certified*, per Thorp, quare who shall certify it and how. Br. Office & Off. pl. 13, cites 38 E. 3. 12.

9. The Court shall not take consuance of a *peculiar jurisdiction*. Br. Presentation, pl. 13. cites 11 H. 4. 7.

S. P. but judges shall be bound to take no-

tice of a county. Mar. 125. in pl. 204.

10. *As if sheriff serves process in the franchise* this is good, quod nota. Ibid.

11. In *quare impedit* if *clear title to the king be confessed by the parties in plea pending* between them, we ought to award * writ to the bishop for the king, though *he be not party*. Per Hank. and Hill. But Culpeper contra, *quare*. Br. Prerogative, pl. 16. cites 11 H. 4. 17.

* Br. Prerogative pl. 106. cites F. N. B. 38. S. P.

12. In *affize* the Court of Office ought to *make the affize to enquire if the disseisin was with force* by reason of the king's fine. Br. Office del &c. pl. 11. cites 11 H. 4. 17.

13. The Court will not nor ought not to *arraign a felon of felony pardoned by act of parliament*, though the *felon prays it*; quod nota; for every one shall take notice of the act of parliament. Br. Corone, pl. 30. cites 11 H. 4. 1.

[488] Br. Charter de Pardon pl. 16. cites S. C. — So that

that if the felon would plead not guilty, the Court ought to refuse it by reason of the pardon.
Br. Notice. pl. 1. cites 26 H. 8. 7.

14. It was agreed, that if the party defendant will admit an ill writ or ill count or the like, yet if the Court perceives it, the Court shall not suffer it, and this seems to be reason; for *amicus curiæ* may inform the Court of error. Br. Error, pl. 49. cites 11 H. 4. 45.

15. In *quare impedit* between two parsons, if it appears to the Court that the king has title by mortmain or otherwise, there the Court may ex officio award writ to the bishop for the king, who is no party to the suit; per Hill and Hank. Brooke says *quare legem inde*. Br. Office del &c. pl. 20. cites 11 H. 4. 71.

Br. Faux.

Latin. pl.

96. cites

S. C. and

says a

stranger as

amicus

curiæ may

shew it,

but effoigner

cannot plead it but shall shew it.

16. It was said that the Court ex officio is bound to abate the writ, if it appears to them by a thing apparent in the writ that it is not good, as for false Latin, or for want of form, notwithstanding that the demandant made default, and the matter was inasmuch as it was *Rex Hiberniæ*, where it should be *Dominus Hiberniæ*. Br. Brief, pl. 210. cites 4 H. 6. 16.

S. P. Br.

Error pl. 50.

cites 11 H.

4. 52. 65.

92. Per

Hul. and that a stranger may inform the Court of Error.

17. The Court ex officio ought to reverse the judgment if they see error, though it be not assigned by the party. Br. Error, pl. 9. cites 9 H. 6. 46. per Cheyney.

18. *Quale jus* was returned and the jurors were demanded and appeared, and the Court of Office made proclamation if any would inform the king or his serjeants &c. and none came, by which the Justices demanded two of the jurors to try the polls, and the Justices said that they should enquire if this juror, who was demanded, had any thing within the hundred, or if he be within the distress of the abbot, or if he be favourable, and so it was done of another who were found indifferent &c. by which the Court discharged the first two, and the other two tried the remainder of the pannel, and the Court said to them that they should enquire if these, who shall be sworn, have sufficient frank-tenement within the county, and if they are within the distress of the abbot or favourable, and after full inquest &c. were commanded to enquire of the collusion, who found no collusion, by which the abbot recovered, and Brown demanded the value of the land per ann. (to the intent the king should have the issues in the mean time) who said to 40s. &c. Br. Office del &c. pl. 28 cites 20 H. 6. 38.

19. Note that it was not denied, but that where an abbot or such like has a peculiar or exempt jurisdiction, or lord of a franchise has *returna brevium* or the like, the Court will not take consuance thereof, but shall write to the sheriff or bishop and not to the other, quod nota; for the other is not his officer

officer immediate to the Court. Br. Office and Off. pl. 2. cites 35 H. 6. 42.

20. *Affise of an office*, and made his title that he ought to take for the adjournment of every *essoign* 42, and the Court found by examination of the clerks that he ought not to have so much, by which they awarded that he should not make such title; for they may have notice of every fee there; by which afterwards the plaintiff amended his title. Br. Office del &c. pl. 26. cites 8 E. 4. 22.

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21. In *trespass* of taking his beasts, the defendant said that a stranger held of him &c. who leased to the plaintiff &c. and for the rent &c. he distrained, the plaintiff said nothing in arrear, and found for him; and by the opinion of all the Justices because the statute is in the negative, scilicet, the lord shall not therefore be punished &c. Now of his confession it appears that the defendant is lord, in which case this writ nor action does not lie, though the defendant has admitted it, yet the Court shall abate it ex officio; for otherwise the defendant shall be fined, which is contrary to the statute. Br. Office del &c. pl. 29. cites 10 E. 4. 7.

22. In ward, the plaintiff surmised that the ancestor of the infant died in his homage; the defendant shewed a gift in tail to the ancestor of the infant, *absque hoc* that he died seised in fee; and it was debated if he shall traverse the dying seised in his homage or not; and at the end of the term the defendant would have amended his bar, and the Court would not suffer it; and Vavisor, who was with another defendant, would have changed his paper [plea], and the Court would not suffer it. Br. Office del &c. pl. 30. cites 2 R. 3. 13.

23. *Debt upon an obligation*, the defendant said the plaintiff is outlawed, and prayed thereof judgment for the king. Brian said this cannot be, for the king has not action thereof pending; but if the king brings *detinuit* of the obligation and this matter be confessed, they may give judgment. Br. Prerogative, pl. 107. cites 4 H. 7. 17.

24. Of a general pardon by act of parliament, the Justices ought to take notice, and to allow the pardon, though the felon pleads Not Guilty, because it is a general act, quod nota. Br. Parliament, pl. 1. cites 26 H. 8. 7.

Br. Char-
ters de Par-
don pl. 1.
cites S. C.

25. Though the Court shall take notice of the custom of gavelkind in Kent without pleading, yet of a special custom to devise &c. or that the lands are holden in socage, or that the feme shall have the moiety for her dower, they ought not to take cognizance without special pleading, they being particular customs; but for the custom of gavelkind it suffices to shew that it is in Kent, and of the nature of gavelkind, without pleading the custom; for the Court take notice what the custom of gavelkind is. Cro. C. 562. cites it as agreed in C. B. per tot. Cur. Mich. 41 & 42 Eliz. in Case of Lauder v. Brooks.

Raym. 60.
Arg. cites
S. C. &
S. P.

26. If

26. If on demurrer on a matter in law though the parties will join issue on some one point, upon which, if it stood alone, judgment should be given for the one party; yet if upon the whole record matter in law appears why judgment should be given against the said party, the Court must judge so; for it is the office of the Court *to judge the law upon the whole record*, and the consent of the parties cannot prejudice their opinions, nor quit them of their office in that point. And therefore though Montague in Case of DIVE v. MANNINGHAM, Pl. C. 69. a. staggers a little in that point upon the book of 34 H. 6. yet in the conclusion he resolves that the Court must ex officio judge upon the whole record. Hob. 56. in Case of Foster v. Jackson.

27. If a judgment be given in London, and this comes into B. R. we ought to take notice of the *custom of London*, because in the Court there the custom need not be alledged, and therefore if we in B. R. do not take notice of it we may reverse the judgment, where there is not any cause; but if a custom be in another place we ought not to take any notice thereof, without its being alledged; per Doderidge J. and agreed by Coke Ch. J. Roll. Rep. 106. pl. 47. Mich. 12 Jac. B. R.

[490] 28. The Court is not bound to take notice of *the New Style*, but of the old English Style (21 Car. B. R.), for the Old is that whereby all accounts in the common law are guided, and not by the New, which is foreign, and goes 10 days before the English Style or account; the old Style is called the Gregorian; the former was made in the time of Julius Cæsar the Emperor, the latter in the time of Pope Gregory the 13th. 2 L. P. R. 235.

29. This Court of B. R. is *not bound to take notice of orders made, and of things which are done at the assizes, although it be by a Judge of this Court*; because he acts not there as a Judge of this Court; Mich. 24 Car. B. R. For the Judges of assizes &c. do act by special commissions, and not as Judges of the common law of any of the courts of Westminster; but *the manner is, upon an order made at the assizes, to get it drawn up by the clerk of the assizes, and to move the Court the next term to have it made a rule of court*; and when that is done both parties shall be bound by it. 2 L. P. R. 238.

30. This Court is not bound, ex officio, to take notice of *private orders made at the council-table*: by Rolle Chief Justice. For they are matters but of particular concernment, and not matters of law or publick business, whereof, as Judges, they are to take notice. 2 L. P. R. 240.

31. This Court is to take notice of *a general statute*, viz. such an one as concerns the publick; for that is become a general law that every person is bound to take notice of. *But not of a particular statute* which concerns some particular part of the kingdom, or particular persons only, in their private interest; for those *publick statutes are proved by shewing the printed statute book*. *But a particular statute must be proved by*
an

an exemplification or copy examined by the record itself, and must be set forth particularly in all declarations and pleadings. But upon a general act the plaintiff may say, that the defendant did such a thing, contra formam statuti in hujusmodi casu edit. & provis. 2 L. P. R. 241, 242.

32. Court will take notice judicially *what day of the month term begins*, and that the cause of action accrued after the declaration delivered, which was generally as of Easter Term, and such declaration refers to the first of the term, if there be no special memorandum. 12 Mod. 647. Hill. 13 W. 3. Thompson v. Southwell.

33. It is a *privilege due to the clerks of C. B. not to be sued in any other court, except for treason or felony*, than in C. B. without their consent; and per Holt Ch. J. this privilege is due to them of common right, of which B. R. will take notice, but that otherwise perhaps it might be of the clerks of the Exchequer. 2 Lord Raym. Rep. 869. Pasch. 2 Ann. B. R. Ogle v. Norcliffe.

34. B. R. will, upon a *writ of error*, take judicial notice of *all private customs in private places*, for they below are as much bound to proceed upon their customs, as the Judges here are upon the common law. Per Holt Ch. J. 11 Mod. 68. pl. 2. Hill. 4 Ann. B. R. Anon.

(C) Of what things the Court ought to take [491]
Consuance, without Averment thereof.

[1. IF a man be indicted, that he killed a serjeant of London in the execution of the king's process, 18th day of November between the hours of 5 and 6; though in truth, this time being in November, is *part of the night*, yet the Court is not bound, ex officio, to take notice thereof, no more than in the case of burglary, without these words, in nocte ejusdem diei, or noctanter. Co. 9. Mackalley 66. resolved.]

[2. In an indictment of burglary, the Court is not bound to take notice that it was done in the night (though the time alledged ought to be in the night), without the words in nocte ejusdem diei, or noctanter. Co. 9. Mackalley 66. b.]

[3. If upon a pleading it appears to the Court, that a proclamation of a fine levied upon the Statute of the 4 H. 7. was made termino Trinitatis 7 Junii &c. though this 7th day of June was dies Dominicus, and so not dies juridicus, yet the Court will not take notice that it was dies Dominicus, without an express averment thereof. D. 2 El. 182. 52. 55. Fish and Broket. Com. 265. the same Case.]

[4. If upon the pleading of a fine it appears to the Court, that one of the proclamations was made termino Paschæ 31 Junii, when there is not, nor never was so many days in this month, the Court will take notice of this without any averment;

ment; for it is *impossible*. D. 2 Eliz. 182. 52. 55. *Fish and Broket*. Com. 265.]

A mandamus was tested the 4 July which was out and therefore the Court taking notice that

that day was after the end of the term, quashed the writ; and says that so it was done in the case of a capias, by which the marshall here was freed of a debt. Sid. 304. pl. 11. Mich. 18 Car. 2. B. R. Sterling's Case. — 2 Keb. 91. pl. 9. S. C. — Sid. 308. pl. 18. the same term in Case of Champion v. Skipwith, the Court doubted if they ought to take notice of the day of the month of the beginning and end of the terms of Trin. and Easter which were moveable.

[5. If upon pleading a fine appears to the Court, that *one of the proclamations was made the 25 Junii termino Pasche*, where *all June was out of the term*, yet the Court shall not take notice thereof, without averment, as by averment, that the feast [term] of Easter commenced the same year the 1 Maii, & finivit ultimo Maii. D. 2 El. 182. 52. Com. 266. b, *Fish and Broket* averred there.]

* Fol. 525.

So where a covenant was to pay primage, average and petit lodgings exception was taken, because the plaintiff did not expressly aver in his declaration what the words meant; because they are termini incogniti; but per Doderidge and Jones, it is according to the covenant and good. Palm. 398. Pasch. 21 Jac. B. R. in Case of Constable v. Cloberie. — Words are to be taken according to the intent of the parties, and this intention and construction of words shall be taken according to the vulgar and usual sense, phrase, and manner of speech of these words, and of that place where the words are spoken as in the Case of *Alga Maris* and *Main-sworn* instead

[492] of forsworn. Bullst. 175, 176. Trin. 9 Jac. in Case of Hewet v. Painter. — As to actions brought for scandalous words not well known to the judges, in what cases the same shall be good without an averment and where an averment shall help it. See tit. Actions for Words (L. b.)

If an action is brought for words of slander, according to the phrase of the country where they are spoken; though the Court does not know

what they signify, yet an action lies without an averment of their signification. For the judges themselves ought to take notice of English words spoke in any country. — Roll. tit. Actions for Words (L. b.) pl. 1. cites it as adjudged Mich. 14 Jac.

Br. Error pl. 134. cites S. C. — So if it be curia

[7. In an action upon the case, if the plaintiff declares that the defendant sold to him *quasdam carucas signatas*, Anglice *car-rooms*, and that the defendant promised firmam facere predictas carucas signatas, Anglice *car-rooms*; though it is not averred what is intended by the word *car-rooms*, nor what it signifies, yet the declaration is good; for it is a phrase in London well known, of which the Court ought to take notice, this being a phrase of the country. Tr. 21 Ja. B. R. Rot. 1416. entered. By *car-rooms* is intended a mark which the Lord Mayor puts upon a cart.]

[8. In a writ of error upon a judgment in an inferior court, if an error be assigned, that the record is quod *quedam curia tenta fuit die Mercurii*, viz. 3 Martii &c. where *Monday was the third day* and not Wednesday, this is error, of which

which the Court is to take notice. 1 H. 7. 12. b. adjudged.]

tenta die
jovis in
festo Sancti
Andree, and

the feast was the Friday this year, it is error for which the judgment was reversed. Ibid. — So where error was assigned that the judgment was given at a Court held at Lynn, 16 February, 16 Eliz. and this day was Sunday, and so found by examination of the almanacks of that year, it was ruled sufficient and that a trial per pais was not necessary, though it was error in fact, and the judgment was reversed. Cro. E. 227. pl. 12. Pasch. 39 Eliz. B. R. Page v. Faucet. — Le 243. pl. 328. S. C. accordingly, though the error was assigned at the bar only; and cases were cited that the justices might judicially take notice of almanacks, and be informed by them.

[9. In a writ of error upon an indictment of trespass, supposing the trespass to be done die Jovis prox. post diem Pentecostes, if it be assigned for error that dies Pentecostes is every day of the week, so that it is uncertain whether he intends diem Jovis in the same week, or next week, yet the Court ought to take consueance of the Feast, scilicet, that Pentecoste dicitur a Pente, quod est quinque, & Coste, quod est decem, & hoc est quinquies decem dies post Pascham, and this day is dies Dominicus, the first day of Pentecost, and so overruled the error without more proof. 7 H. 6. 39. adjudged. Com. 122. b.]

Br. Error,
pl. 59. cites
S. C. — Br.
Jour, pl. 27.
cites S. C.
— Fitzh.
Error,
pl. 17. cites
S. C.

[10. In account, if the plaintiff declares, that the defendant was his bailiff &c. in such a day in such a year &c. till the Feast of St. Michael &c. though in the declaration it is not St. Michael the Archangel, or St. Michael in Monte Tumba, yet the Court shall intend it to be St. Michael the Archangel, because this is the most famous St. Michael, and therefore the declaration is certain enough. 20 H. 6. 23. adjudged.]

And the
defendant
was com-
pelled to an-
swer not-
withstand-
ing his ex-
ception.
Br. Count,
pl. 13. cites
S. C. — Br.
Exposition, pl. 20. cites S. C. and
if he was his bailiff or receiver till the feast of another St. Michael, the defendant might plead it.
— Br. Jour, pl. 5. cites S. C.

S. C. — Fitzh. Count, pl. 31. cites S. C. — Br. Exposition, pl. 20. cites S. C. and if he was his bailiff or receiver till the feast of another St. Michael, the defendant might plead it. — Br. Jour, pl. 5. cites S. C.

[11. But if he had declared from such a day &c. till the Feast of the Blessed Virgin Mary, this had not been good, because it is uncertain what feast he intends, there being two. 20 H. 6. 23. per Newton.]

Br. Jour,
pl. 6. cites
S. C. &
S. P. —
Fitzh.
& S. P.

Count, pl. 31. cites S. C.

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[12. In a writ of error to reverse an outlawry, if it appears that the exigent was returnable at the utas of the Holy Trinity, and that the fifth county was held the 11th of July, though in truth the utas of Trinity was the 10th of July, and so the return of the writ before the fifth county was held, yet the Court shall not take consueance thereof without averment. 21 H. 6. 13. an Averment there made.]

Fitzh.
Error,
pl. 32. cites
31 H. 6. 13.
S. P. [and
Roll seems
misprinted
(21) for
(31). —
Br. Process,

pl. 176. cites 31 H. 6. 13. — Br. Jour, pl. 84. cites 31 H. 6. 6. [but it should be (13) there being no fol. 6. in either of the editions of that year, but the fol. runs on from 30 H. 6. to 32 H. 6.]

[13. If a man pleads a thing to be done at such a feast, or before such a feast, this is well enough without averment of the

Fitzh.
Count.
pl. 31. cites

S. C. but the month when the feast was. 15 H. 7. 2. b. admitted 20 H. 6. 23.]
 S. P. does not exactly appear. — Br. Count, pl. 13. cites S. C. but S. P. does not fully appear.

Cro. C. 275. pl. 13. [14. If in *trespass* the defendant justifies for an amercement in the sheriff's turn; which by the Statute of the 31 E. 3. [cap. 15.] is to be held *infra mensem post festum Paschæ & Michaelis*, and the defendant says the plaintiff was amerced at a court held the 18th of April *infra mensem Paschæ*, and does not say *infra mensem post festum Paschæ*, and therefore adjudged not to be a good plea; for that though it appears by the almanacks that the 18th of April was *infra mensem* after the Feast of Easter, yet the Court is not bound to take notice thereof without an averment thereof, nor to inspect an almanack for it; but (*) it was said by Justice Jones, that they are bound to take notice of *immoveable* feasts, and not of *moveable* feasts, as this is. Mich. 8 Car. B. R. between Griffin and Badle adjudged upon Demurrer. Intratur Hill. 5 Rot. 43.]
 S. C. ad- judged. — Jo. 800. pl. 3. S. C. and per Cur. the Court is not bound to take notice of
 * Fol. 526. moveable, but only of immoveable feasts; and judgment for the plaintiff.

3 Le. 93. 15. If a woman brings an appeal upon the death of her brother, in pl. 133. and the defendant admits it without challenge or exception, S. P. & yet the Court ought to abate the appeal. 2 Le. 162. per S. C. cited per Wray. Wray, cites 10 H. 4. 7.
 — So if she brings appeal of the death of her father; per Cur. Palm. 311. Mich. 20 Jac. B. R.

Br. Office del &c. 16. The Court ex officio abated a writ against an hostler, pl. 22. (bis) because he was not named a common hostler in the declaration. cites S. C. Br. Office del &c. pl. 12. cites 11 H. 4. 45.
 though the plaintiff admitted the writ and count. — S. C. cited by Rhodes J. and agreed by Periam J. Gouldsb. 106. in pl. 11. — 2 Le. 162. in pl. 196. and 3 Le. 92. 133. S. P. by Wray, and cited 11 H. 4. and 38 H. 6. 42.

If to an action brought the defendant pleads in bar by deed, and does not shew the deed, and the other pleads in bar, and does not except thereunto, but they were at issue, this is error; for the Court ex officio ought to have adjudged it ill. Gouldsb. 106, 107. in pl. 11. per Rhodes J. says so in the book of 22 H. 6. or 28 H. 6. and that he can shew the case.
 17. The Court ex officio is not bound to take consueance of the error in writ of error, but the party shall assign it. See 24 E. 3. 34. if the party assigns errors, though they are not errors, the Court ex officio shall see if there are any other which by the parties are not touched &c. and also to see the record, if there is any matter to affirm &c. quod nota. Br. Office del &c. pl. 9. cites 20 H. 6. 18. 28 H. 6. 11.

[494] 18. Where an indictment is insufficient, or exigent awarded Br. Superfedeas, pl. 30. where it does not lie, there the Justices upon information shall award *superfedeas ex officio*. Br. Office del &c. pl. 8. cites S. C. 5 E. 4. 7.

3 Le. 92. 19. In a *formedon* of a manor the tenant pleaded joint-tenancy pl. 133. by fine with J. S. The demandant averred the tenant sole tenant Mich. 26 as

as the writ supposed, and found for the demandant. It was assigned for error, that where, upon joint-tenancy pleaded by fine, the writ ought to abate without any averment by the demandant against it, the averment has been received against the law &c. Though the tenant hath admitted and accepted this averment, viz. sole tenant, as the writ supposes, yet Wray held, that the Court should abate the writ without exception of the party. 2 Le. 161, 162. pl. 196. 21 Eliz. C. B. Anon.

Eliz. B. R. the S. C. in totidem verbis.

20. Though the defendant by his plea admitted that the action lay against him, yet when the matter at the beginning is not sufficient to charge him, as where the defendant was charged as administrator on a simple contract, the Court ex officio ought to abate the writ without exception of the party, and the defendant's plea takes not away the authority of the Court, but they may abate the writ at any time after. Resolved per tot. Cur. Cro. E. 121. pl. 12. Mich. 30 & 31 Eliz. B. R. Hughson v. Webb.

Gouldsb. 106. pl. 11. S. C. adjudged accordingly. — If action of debt be brought against an executor on a simple contract of the testator,

and he pleads to it, and does not demur upon the declaration, judgment shall be given against him, and the Court ex officio will not abate the writ without challenge of the party. Yelv. 56. Mich. 2 Jac. B. R. in Case of Fish v. Richardson, cites 10 H. 6. — Where it appears to the Court that the writ ought to abate, there the Court ex officio ought to abate it, though the party admits it by pleading in bar; per Cur. Röll. Rep. 176. pl. 13. Pasch. 13 Jac. B. R. Anon.

21. *Assumpsit to deliver an indenture ante finem termini sanctæ Trin. tunc proxim. sequent. The promise was 5 Junii. The plaintiff alledged, that Trinity Term incept 7 die Junii, & finivit 26 Junii.* Anderson held, that the *Essoin Day* is the first day of the Term, which was 3 Junii, and then the indenture was not to be delivered till Trinity Term was a twelvemonth; but the 3 other Justices contra, for the plaintiff has expressly alledged that the term began the 7th of June, and the defendant had not denied it, and the Court ex officio are not to search the rolls of the Court, and although in law the *Essoin Day* is the first day of the term, yet in common speech, that is the first day of the term when the Court sits; and Anderson, against his own opinion, gave judgment for the plaintiff. Cro. E. 210. pl. 6. Mich. 32 & 33 Eliz. B. R. Bishop v. Harcourt.

Wilde J. held, that the Court is bound to take notice of the beginning of terms; but by Twisdem J. the Court cannot take notice of the days of terms, or at least it is in their discretion, and cited the principal Case of Bishop v.

Harcourt. 3 Keb. 397. pl. 98. Mich. 26 Car. 2. B. R. in Case of Alderton v. Miller.

22. Though in judgment of law every judgment relates to the first day of the term, yet where the plaintiff in his declaration expressly sets forth an award in Easter Term in & super 20 Maii, that the defendant imposterum should surcease such suit &c. and that the defendant after the 20 Maii prosecuted the suit to judgment, though it appears to be all in one term, yet the defendant should have demurred to it, because it is specially laid down in time the one to be after the other, and having taken issue upon the point of the action, viz. Non assumpsit, the other matter alledged in the declaration is only collateral and inducement,

ducement, and now the Court cannot judicially take notice of it without resorting to the other record, viz. the Record of the Judgment, which they ought not to do, because the plaintiff has precisely alleged it to be after 20 May in time. Yelv. 35. Pasch. 1 Jac. B. R. Huys v. Wright.

[495]

Jenk. 330,
337. pl. 61.
S. C. the
judges ex
officio
ought to
take notice
of Easter
term, and
other terms.
Affirmed in
error.

23. If tenant brings *trespass vi & armis against his lord*; the Court ought to abate the writ ex officio; but when it is abateable by collateral matter of fact dehors, of which they cannot take notice as Judges, it is otherwise, unless it be pleaded; per Cur. obiter. Palm. 311. Mich. 12 Jac. B. R.

24. In assumpsit the plaintiff declared, *that defendant being indebted to him in 15l. in consideration the plaintiff would give him time for payment thereof until the first day of Easter Term, promised to pay &c.* It was assigned for error, because it was not shown when Easter Term began; sed non allocatur; for it is well known to the Court, and the action is conceived after the end of the term. Cro. J. 548. pl. 8. Mich. 17 Jac. B. R. Austin v. Bewley.

25. Writ of enquiry of damages was awarded *returnable die Lunæ post quin den. Hillarii prima Caroli*, and the sheriff returned the inquisition taken before him 27 die Januarii, which was after the day of the return of the writ, and so without authority; but so far as it was not assigned upon the record, although in truth it were so, the Court would not take cognisance thereof; and it may be that die Lunæ post quin den. Hillarii was the 28th or 29th of January, and then the inquisition is well taken, and so it shall be intended; and if not, the Court shall not take notice thereof unless it had been assigned; whereupon the judgment was affirmed. Cro. C. 53. pl. 11. Mich. 2 Car. in Cam. Scacc. Morris v. Fletcher.

26. The Court is bound ex officio to take notice of all matters which do appear upon the record depending before them, but of matters dehors, viz. to search the almanack for days, and to compute times mentioned in the record, they are not bound ex officio to do it. 2 P. R. 234. cites 21 Car. B. R. 14 Car. B. R.

Sid. 97.
S. C. Roll
J. Yald, it is
a question
whether the
Court is
bound to
take notice
of the al-
manack,
and the feast
days there
set down
or no.

27. Submission to an award was ita quod it be made before Easter next ensuing. In debt on the bond the defendant pleaded *quod nullum fecerunt arbitrium ante festum Paschæ*. Plaintiff replied, *that before Easter, viz. 15th of April following the arbitrators awarded &c.* After trial exception was taken to the verdict, because it did not find that the award was made before Easter, and the Court cannot take notice ex officio, that the 13th of April was before Easter; but it was answered, that the replication alleged it to be before Easter, viz. 15th of April, and that the defendant in his rejoinder had omitted the words (*ante festum Paschæ*) so that the time was not in issue. And upon this reason Mr. Hales told the Reporter that the Court rested for that point; for he held that the Court otherwise could not take notice of the time ex officio, though Mr.

Weston

Weston said, that the opinion of Roll was, that they might if they pleased. All; 85; 87: Mich. 24 Car. B. R. Kinaffon v. Jones.

28: The Court is not obliged to take notice of the *day of the month, upon which the moveable terms is.* Lev. 196: Mich. 18 Car: 2. B. R. Courtney v. Philips.

Sid. 300.
pl. 6. S. C.
and S. P.
but when
the day

of the month is *alleged in the record* the Court may take notice of it, and the day of the return shall be tried by almanacks; Arg. quod fuit concessum per curiam.

(D) In what Cases the Court ought to take [496] Notice of the *Ecclesiastical Law*.

[1:] *If administration be granted to B. of the goods of A. deceased, and it appears in pleading, that C. is of the age of 16 [* 17], the Court ought to take notice of the ecclesiastical law, that the administration is void, and determined.* Mich. 14 Car. B. R. between *Dampporte and Pincet*, per Jones, Croke, and Berkley, but Brampton e contra.]

* Cro. C.
516. pl. 16.
Davenport
v. Penfel
S. C. curia
advifare
vult. —
5 Rep. 29.
a. Hill. 40.
Eliz. C. B.

Piggot's Case. S. P. — Cro. E. 60a. pl. 14. *Piggot v. Gascoigne* S. C.

Inasmuch as the consueance of the right of marriages belong to the Ecclesiastical Court, and the same Court has given sentence in such case, the judges of our law ought though it is contrary to the reason of our law to give faith and credit to their proceedings and sentences, and to think that the proceedings are consonant to the law of holy church; for cuilibet in arte sua perito est credendum; and so have the judges of our law always done, as appears in 34 H. 6. 14. b. 11 H. 7. q. a. b. 4 Rep. 29. a. pl. 18. Mich. 27 & 28 Eliz. Per Cur. in *Case of Bunting v. Lepingwell*. — 8. P. resolved: 5 Rep. 7: a. Hill. 33 Eliz. *Cawdry's Case*. — 2 Vent. 43: per Archer J. S. P. and cites 4 Rep. 29. — 7 Rep. 42. b. S. P. Per Cur. in *Kehn's Case*. — Jenk. 289. pl. 26. S. C. and S. P.

2. The Judges of the common law shall take consueance *what is the law of the church or of the admiralty &c.* and not to take it as the bishop pleads it, nor to write to certify it, per Moyle and Prisot, and yet the laws are different; for they judge that where a man and a woman make a contract of matrimony, that immediately the man may take the goods of the woman, contra by our law; and that he who is born and begot before the espousals is *mulier*, if the father and mother intermarry afterwards, contra to our law, and yet if they certify such mulier our law shall take it as a good certificate; there caveatur and *shall aid it by special pleading &c.* Br. Quare Impedit. pl. 12: cites 33 H. 6. 12. 32: 34 H. 6. 11: 38. and 35 H. 6. 18.

3. A *parson* and a *vicar* were at *issue* for tithes, and did not take advantage of the *jurisdiction*, yet when the Court perceived it they dismiss the matter ex officio; for it is a spiritual cause. Br. Office del &c. pl. 17. cites 22 E. 4. 23.

4. The Court ought to take notice of, and give credit and faith to the *proceedings and sentences* in the Spiritual Court, and to think that their proceedings are consonant to the law of holy church; for *cuilibet in sua arte perito est credendum*; 7 Rep. (43. b.) 44. b. Mich. 4 Jac. in the Court

of Wards
in Kenne's
Case, S. P.
—Mo.
169. pl. 302.
S. C.

though what they do there be against the reason of the law. 4 Rep. 29. a. pl. 18. Mich. 27 & 28 Eliz. the first Resolution in Bunting's Case.

5. When a bishop refuses a clerk presented to him, he ought to assign the cause in certain, because though the King's Court cannot properly determine schisms heresies, yet the original cause of suit being matter whereof the King's Court hath cognizance, the case may be alledged that the Court may consult with divines, or if the party be dead, direct a jury to try it. 5 Rep. 57. b. 58. a. Hill. 32 Eliz. B. R. in Specot's Case.

[497] (E) What Things the Court may do. [Refuse to give Judgment. In what Cases.]

Br. Judgment pl. 48.
cites S. C.
—See tit.
Judgment
(B. 9)

[1.] IF upon examination the Court finds, that the *tenant in a formoden* hath confessed the action of the demandant, where the demandant had before brought such writ against another, where the parcel was put without day by nonage, so that there appears an apparent deceit; the Court may refuse to give judgment thereupon. 39 Ed. 3. 35.]

In what Cases the Court may vacate a Judgment, See Tit. *Ulat* per totum.

See tit.
Conscience
of pleas (E)

(F) What Things shall be incident to a Court.

[1.] IF the king grants a court by letters-patents to a corporation of a town, to hold pleas &c. in this case, though there is not any clause in the patent to make a bailiff or serjeant to execute the process of the court, and to return juries &c. yet it is incident to their grant to do it, for otherwise they cannot hold a court. Mich. 14 Car. B. R. in *Metcalf and Worsely's* Case, per Curiam agreed.]

See Roll.
tit. Error
(I. c) pl. 5.
S. C.

[2. But upon such grant of a court, if there be not any clause in the patent to make a bailiff to execute writs of enquiry of damages is to be granted, this ought to be returnable in court, and there the enquiry ought to be made, for the bailiff cannot execute it, inasmuch as he cannot execute it without giving an oath to the jury and witnesses, which the letters do not give him power to do; for this is not necessarily implied in the grant of the Court, inasmuch as it may be done in court. Mich. 14 Car. B. R. between *Metcalf and Worsely*, per Curiam, in a Writ of Error out of an inferior Court, and the first Judgment reversed accordingly.]

3. When a new court is erected it is necessary that the authority and jurisdiction of the Court should be declared; for such a new court can have no other jurisdiction than is expressed in the erection; for a new court cannot prescribe. 4 Inst. 200. 213.

4. It is incident to every court created by letters-patents or act of parliament and other courts of record, to imprison for any misdemeanor done in contempt or disturbance of the Court, but where there is only a power granted as to impose fines and amercements, that ought to be pursued. But in case where such a power of imprisoning is given *implicite* by the law, a person cannot be committed to prison without bail or mainprise, until he shall be delivered by the parties who committed him. 8 Rep. 119. b. Hill. 7 Jac. in Bonham's Case.

(G) At what Time the Court ought to be held. [498]

[1. IF the king grants a court to be held die Jovis every week, it may be held in one week, and be thence adjourned for two weeks after, leaving a week mean. Mich. 4 Jac. B. R. between Coa and Clerk.]

[2. But it would be otherwise, if the words in the patent should be, *et non aliter, vel alio modo*. Tr. 4 Jac. B. R. between Coa and Clerk.]

[3. Hill. 4 Ed. 1. B. Rot. 29. Comes Gloucestris calumniat quod secundum legem & consuetudinem regni nullus jurare debet in affisa post clausum Alleluia.]

[4. If a *leet* hath been held at a certain day, and this is changed, and held at another day, this is void. 38 H. 6. 7.]

S. C. — Fitzh. Lect. pl. 2. cites S. C.

[5. But if a court-baron hath been held at a certain day, this may be held at another day. 38 H. 6. 7.]

S. C. — Fitzh. Lect. pl. 2. cites S. C.

Fol. 527.

Br. Court Baron &c. pl. 17. cites

Br. Court Baron &c. pl. 17. cites S. C.

6. 9 H. 3. cap. 35. enacts that * No county shall be held but from month to month; † and where a greater term has been used it shall be greater.

* This is in affirmance of the common law and

custom of the realm s Inft. 70. — The word (county) is taken in the common sense for the county Court. 2 Inft. 70.

† This is altered by the Statute of 2 E. 6. [cap. 25.] whereby it is provided that no county shall be longer deferred, but one month from Court to Court, and so the said Court shall be kept every month and no otherwise; and there are to be accounted 28 days to the legal month in this case, and not according to the month in the calendar. s Inft. 71.

7. Nor shall any sheriff or his bailiff makes his tourn by the hundred, but twice in a year in the due and customed place, to wit, once after Easter and once after Michaelmas.

But now by the Statute 31 E. 3. Stat. 1. cap. 15.

enacts that every sheriff shall make his tourn once in the month after Easter, and the other time in the month after St. Michael; and if they hold them otherwise, they shall * lose their tourn for the time.

Lord Coke says, that this Statute of 31 E. 3. explains this part of the Statute of 9 H. 3. cap. 35. and that the words shall lose their tourn for the time, is as much as to say as the Court so holden for that time shall be utterly void, and the sheriff shall lose the profits thereof. s Inft. 71.

8. And the view of frank pledge shall then be made so that every one have his franchises. And the view of frank-pledge shall be made

This clause extends to the enquiry made

of felonies, made so, viz. that the king's peace be kept, and the tithing kept entire used to be, and that the sheriff be content with so much as he was wont to have for his view making in the time of K. H. our great grandfather.

the view of frank-pledges and to all things inquirable in the tourn. Now by this clause it is provided that the article of the tourn concerning the view of frank-pledge, being here understood in particular sense, shall be dealt withal by the sheriff in his tourn but once in the year, viz. at the tourn holden after Easter and so it has been formerly expounded; and therefore it was well resolved in 24 H. 8. that this clause of the Statute of Magna Charta, is to be understood of the leets of the tourn, and not of other leets, and so without question is the law holden at this day, that he that claims a leet by charter, must hold it at the same days which are contained in the charter, and he that claims it by prescription may claim to hold it once or twice every year, at any such days as shall upon reasonable warning be appointed, if the usage had been so, so that it has been kept at uncertain times, or else it ought to be kept at such certain days and times, as by prescription [499] hath been certainly used, and the next words to this clause be, ita scilicet quod quilibet habeat libertates suas, quas habuit &c. do explain the meaning of this chapter, that it extended not to the leets of the subjects, but they should have their liberties as before they had; and this also appears by the conclusion of this chapter, et quod vicecomes &c. contentus sit de eo quod vicecomes habere consuevit de visu suo faciendo; so as it must be visus suus, the sheriff's view, which of necessity must be parcel of the tourn, and it is said in the mirror that this view of frank-pledge (parcel of the tourn) should be made once every year. 2 Inst. 72.

It seems certain, that since these statutes, the sheriff is indictable for holding this Court at another time than what is therein limited, or at any unusual place. Also it has been resolved, that an indictment found at the sheriff's tourn, appearing to have been holden at another time is void; but it is observable, that neither of these statutes do expressly mention a Court leet, and therefore it is said in some books, that they do not extend to it, neither do I find any resolution, that an ancient Court leet holden at any other time, or at an unusual place is void; but on the contrary it is said, that a Court leet may be holden at any place within the precinct which the lord thinks fitting, and it seems to be agreed, that a prescription to hold such Court oftner than twice in the year is good, which seems hardly reconcileable with the general rule of law, that no prescription can stand good against a statute which has negative words, if a Court leet be construed to be within the purview of the abovementioned statutes. It is true, indeed, that both Sir Edward Coke and Kitchen endeavour to solve this difficulty, by offering a distinction that the said rule extends not to statutes made in affirmance of the common law, but it is questionable how far this will amount to a good answer, since it seems to be holden by others of good authority, that the said statutes were not made in affirmance of the old law, but are introductory of a new one; yet it is certainly safest to hold a Court leet at the times accustomed, for it is said, if it be holden at an unusual time, it is void; and it seems that no Court leet granted since the statute, can be holden at any other time than what is limited by it, because every such Court is derived out of the tourn, to which the statute certainly did extend. a Hawk. Pl. C. 56, Cap. 10. S. 6, 7, 8.

9. A leet cannot be held at any other time, but only within a month after Easter and Michaelmas, unless that it is by patent or special prescription. 2 Saund. 291. Hill. 22 & 23 Car. 2. at the End of Dekins's Case, says, Vide Stat. Magna Charta, cap. 35. 31 E. 2. cap. 15. Tit. Leete 32.

Mo. 68.
pl. 185.
S. C. in
totidem
verbis.—
Dal. 70.
pl. 41.
S. C. in
totidem
verbis.

10. One enters a plaint in a bafe court to pursue in the nature of a writ of entry in the post, and had summons against the party until such a day, at which time, and after sun-set, the steward came and held the court, and the summons was returned served, and the party made default, and judgment given; the question was, if the judgment was good. Dyer, Welch, and Benlowes held the judgment good, although the court was held at night; and Dyer said, that if it were erroneous, he could have no remedy by writ of false judgment nor otherwise, but only by way of petition to the lord, and he ought in such case to do right according to conscience, for he hath power

power as a * Chancellor within his own court. Owen. 63. * S. P. per Cur. Le. s. Mich. 6 Eliz. Anon. pl. 2. Hill. 25 Eliz. B. R.

11. A man may prescribe to *hold* a leet *officer*, and * at *other times* than are mentioned in the Statute of Magna Charta. Cap. 11. [35]. For it is in the affirmative; per all the Justices. Cro. E. 125. pl. 4. Hill. 31 Eliz. B. R. Patridge's Case. 2 Le. 28, 29. pl. 31. The Queen v. Patridge, S. C. & S. P. held by all the justices. — S. P.

as to a leet by prescription, per Cur. cites 20 H. 7. 22 & 18 H. 6: 11. but where a leet is by grant it was held a good exception, that the defendant did not shew that the Court was within a month after Easter, but only said that it was held the 23 Apr. Cro. E. 245. pl. 3. Mich. 33 & 34 Eliz. B. R. Porter v. Gray. — Ibid. 300. pl. 15. Pasch. 34 Eliz. B. R. the S. C. but a D. P. — Per Brian; by Magna Charta cap. 35. leet shall be held but only once in a year, viz. at Mich. only. But by anno 24 H. 8. this is intended of the leet of the town of the sheriff, and not of other leets. Br. Lect. pl. 25. cites 8 H. 7. 1. — Roll. Rep. 201. pl. 3. Arg. cites 8 H. 7. [1] that the reporter there seems of opinion that a leet is within a statute; but Coke Ch. J. said, that if this should be so, it would overthrow all the leets in England, and that the said statute is of tourns, but a leet may be held by prescription at any time of the year; and Doderidge seemed to be of the same opinion. Trin. 13 Jac. B. R.

The difference is between a *leet by grant* or *by prescription*; in the first it must be shewn to be held within the time limited by the statute, but in the last case it is otherwise. Cro. E. 245. Porter v. Grey. — But where in an indictment it was laid to be held at *F. the sixteenth day of September*, (without saying within a month of Easter or Michaelmas) yet it was held good. 22 Mod. 227. Queen v. Jennings. — and cites the Case of the King v. King.

* The one may prescribe to hold a Court leet at other times than mentioned in Magna Charta; But unless that *prescription appears* it shall not be presumed; per Cur. 12 Mod. Trin. [500] 7 Ann. B. R. 228. Queen v. Jennings.

12. It was assigned for error to reverse an outlawry, that a county court was held 23 Feb. and that the next county court was held 23 March following, so that there were not 28 days between those two county courts, and this was held erroneous; but Tapfield said, that this ought to be assigned as an error in fact; for it might be leap-year, and then it is good, and that matter issuable. Cro. J. 167. pl. 7, Trin. B. R. Leech's Case.

(H) In what Places the Court may be held.

[1. A Court baron ought to be held upon some part of the manor, for ~~that~~ be held out of the manor it is void. Co. Lit. 58.]

[2. But if the lord, being seised of two or three manors, hath usually time out of mind, held court barons at one of the manors for all the manors; then by the custom such courts are well held, though they be not held within the several manors. Co. Lit. 58.]

[3. A customary copyhold court cannot be held out of the manor. Co. 4. between Melwich and Luter, 26. resolved. Co. 4. 27. between Clifton and Molineux resolved, that the steward cannot make grants and admittances at any court held out of the manor.]

4. Leet may be held at any place within the hundred; contra of court baron; per Brian. Br. Leet, pl. 23. cites 8 H. 7. 1.

5. Leet may be held in any place within the precinct where the lord shall please. Br. Court Baron, pl. 8. cites 8 H. 7. 3. Per Brian.

6. Law day may be in auters terres. D. 30. b. pl. 209.

(I) What shall be said of Courts of Record.

The Court of Admiralty is no Court of record. Br.

[1. THE Court of Admiralty is not any court of record, and therefore no recognizance can be taken there. Tr. 8 Jac. B. said to be adjudged.]

Error. pl. 177. per Brooke, who says it seems so; because it is held by the civil law. — 13 Rep. 53. S. P. and for the same reason and cites B. R. Error. pl. 77. accordingly [but it is misprinted for 177.] — 4 Inst. 135. cap. 22. S. P. — Noy. 24. per Warburton S. R.

[2. The English Court of Chancery proceeding upon a subpoena, and by way of decree, is no court of record. 37 H. 6, 14. b. per Prisot.]

[3. The County Court is no court of record. Co. Litt. 117. b.]

4 Inst. 380. S. P. — 4 Inst. 263. cap. 54. and 268. cap. 55. S. P. — And though a plea be holden therein by a justices (the King's writ) yet it is no Court of record; for of a judgment therein a writ of false judgment lies, and not a writ of error. 3 Inst. 140. — 6 Rep. 12. b. S. P. in Gentleman's Case. — Co. Litt. 117. b.

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[4. The Hundred Court is no court of record. Co. Litt. 117. b.]

cap. 54. S. P. — Ibid. 267. cap. 56. S. P. — Co. Litt. 117. b.

[5. A Court Baron is no court of record, Co. Litt. 117. b.]

4 Inst. 263. cap. 54. and Ibid. 268. cap. 57. S. P. — Co. Litt. 117. b. S. R.

That is, the leets and tourns which are 6. The leets and tourns are courts of record, and have authority to assess fines. Br. Leet, pl. 39. cites F. N. B. 82.

for the publick weale, as for keeping the peace, these are Courts of record, and consequently for keeping the peace the sheriff is judge of record and may take recognizance for the keeping the peace ex officio; but yet all the pleas holden before him in the county are not of record, nor pleas held before him in the county of writ of justices are not taken as matters of record; for these pleas are held before him by reason of the Courts, which he has by reason of his office, as the county Courts and hundred &c. F. N. B. 82.

Where there is a power erected de novo by parliament

7. Wherever there is a jurisdiction erected with power to fine and imprison, that is a court of record, and what is there done is matter of record. 1 Salk. 200. pl. 1. Trin. 12 W. 3. B. R. Groenvelt v. Burwell.

to convict, and fine, and imprison either of these make it a Court of record. 12 Mod. 388. per Holt Ch. J. who delivered the judgment of the Court, in Case of Grenville v. College of Physicians S. C. — Carth. 494. S. C. & S. P. by Holt Ch. J.

(I. 2) What shall be done in Cases where the Court is divided.

1. **I**N B. R. and C. B. and the Exchequer, or in the Exchequer Chamber, where all the Justices are assembled, if the Justices are equally divided *no judgment shall be given.* 12 Rep. 117. in Sir Stephen Proctor's Case.

2. And so it is in the Court of *Parliament.* 12 Rep. 117, in Sir Stephen Proctor's Case.

3. It is the usage of C. B. when the Judges are of 3 opinions, to give the rule according to the opinion of the 2 which agree. 2 Vent. 24. Trin. 22 Car. 2. C. B. Rudyard's Case.

4. In a *motion in arrest of judgment* if the Court had been divided on the first motion, the plaintiff might have entered his judgment, but where there is a former rule to stay judgment, this rule must stand or be discharged, and discharged it cannot be, because the Court is equally divided. Per Cur. 1 Salk. 17. pl. 7. Trin. 11 W. 3. B. R. Iveson v. Moor.

Ld. Raym. Rep. 486. 495. S. C. & S. P. but because after the former motion it cannot be entered with-

out continuances, there must be a rule for judgment which cannot now be had, the Court being divided. — 12 Mod. 62. 267. S. C. & S. P. that here was an *advifare vult* indefinitely, and so judgment cannot be entered without continuances, and while the Court is divided it continues an *advifare vult*. If the rule had been temporary and expired the matter had been at large. — 6 Mod. Trin. 203. 3 Ann. B. R. Walmley v. Ruffel S. P. and cites S. C. — but if it had been upon demurrer or special verdict, then it would be adjourned to the Exchequer Chamber. — 3 Mod. 122. Hill. 3 Jac. B. R. The Countess of Plymouth v. Throgmorton.

5. At nisi prius plaintiff had a verdict, and on a motion for a new trial the Court were divided in opinion; and no rule being made, plaintiff was at liberty to sign final judgment. Barnes's Notes in C. B. 322. Hill. 10 Geo. 2, Cartledge v. Eyles.

(K) The Court of Constable and Marshal.

[502]
Of the office of marshal and jurisdiction of the Court of Marshal-fee. See tit. Marshal and Marshal-fee.

[1. **R**OT. Parl. 22 Ed. 3. numero 4. *fifteenth granted upon divers conditions* to be entered in the rolls of parliament, scilicet, among others, *that there be no mareschalsey in England, except the mareschalsey of the king, and of the guardian of England, when the king shall be out of England.*]

[2. * H. 4. numero 79, the commons pray against the court of the constable and marshal; but no assent thereto, simile ibid. numero 99. for holding pleas of matters triable by the Justices according to the common law; but no assent thereto.]

* This should be 2 H. 4. No. 76. according to Fryne's Abr. of Cotton's

Records 417. And the answer was, that the statutes therefore provided shall be observed. But ibid. No. 99. is 2 D. R. but it seems it should be No. 89.

3. 8 Rich. 2. cap. 5. *Pleas which touch the common law, and ought to be discussed by the common law, shall not be drawn or held before the constable and marshal,*

* This is to be understood in any foreign part beyond the seas, in partibus exterior & transmarinis, for upon the sea the admiral has jurisdiction, which admiral (our English Neptune) cannot meddle with any thing done beyond the seas upon the land, and the constable and marshal shall have no consuance of any thing done upon the sea. 4 Inst. 124.

4. 13 R. 2. cap. 2. *To the constable it appertaineth to have cognizance of contracts touching deeds of arms and war * out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by the common law, with other usages and customs to the same matters pertaining, which other constables heretofore have duly and reasonably used in their time; and that every plaintiff shall declare plainly his matter in his petition before that any man be sent for to answer thereunto. And if any will complain that any plea be commenced before the constable and marshal, that might be tried by the common law of the land, the same plaintiff shall have a privy seal of the king without difficulty, directed to the said constable and marshal, to surcease in that plea until it be discussed by the king's council, if that matter ought of right to pertain to that Court, or otherwise to be tried by the common law of the realm of England, and also that they surcease in the mean time.*

They proceed according to the customs and usages

5. 1 Hen. 4. cap. 14. *All the appeals to be made of things done out of the realm, shall be tried and determined before the constable and marshal of England for the time being,*

of that Court, and in cases omitted according to the civil law, secundum legem armorum; and therefore upon attainders before the constable and marshal for the time being, no land is forfeited or corruption of blood wrought. 4 Inst. 125. cap. 17.

Consideration upon the Statute 1 H. 4. cap. 14. was had, how the word appeals shall be intended before the constable and marshal. And 22 Eliz. DOUGHTIE'S CASE, petition was made to the queen by the heir to make a constable and marshal, but she would not. Admitting that the king grants a commission of the office of a constable and marshal, whether the king may have any remedy before them by indictment, or information by the Attorney General? Hut. 3. Anon. [But it is there left a quære.] See pl. 9.

6. *At the request of the commons the king granted, that one Bennet Williams, who was imprisoned to answer before the constable and marshal of England, should be tried according to the common laws of the realm, notwithstanding any commission to the contrary; and thereupon a writ was accordingly directed to the Justices of the King's Bench, as may appear, Pryn's Abr. of Cotton's Records, 429. 5 H. 4. pl. 39.*

[503]
3 Inst. 48.
S. P. and
cites S. C.
and Stanf.
Pl. C. 65.
Mich. 25, &
26 Eliz.
Dowtie's
Case.

7. *If two Englishmen do go into a foreign kingdom, and fight there, and the one murders the other, lex terræ extends not hereunto, but this offence shall be heard and determined before the constable and marshal, and such proceedings shall be there by attaching of the body, and otherwise, as the law and custom of the Court have been allowed by the laws of the realm. 2 Inst. 51. cites 13 H. 4. 5.*

8. *Appeal of treason lies not at common law, but it lies before the constable and marshal, and there it shall be determined by the civil law. Br. Trespass, pl. 197. cites 37 H. 6. 2, 3.*

9. If

9. If a *subject* of the king be killed by another of his subjects out of England, in any foreign country, the wife, or he that is heir of the dead, may have an appeal for this murder or homicide before the constable and the marshal, whose sentence is upon testimony of witnesses or combat. And accordingly, where a subject of the king was slain in Scotland by other of the king's subjects, the wife of the dead had her appeal therefore before the marshal and constable. And so it was resolved in the reign of Q. Eliz. in CASE OF SIR FRANCIS DRAKE, who struck off the head of D. in partibus transmarinis that his brother and heir might have an appeal, sed regina noluit constituere constabularium Angliæ &c. & ideo dormivit appellum. Co. Litt. 74. a.

10. Matters done out of the realm of England, concerning war, combat, or deeds of arms, shall be tried and determined before the constable and marshal of England, before whom the trial is by witnesses, or by combat, and their proceeding is according to the civil law, and not by the oath of 12 men. Co. Litt. 261. a.

11. The court of the constable and marshal have consuſance of contracts, of deeds of arms, and of war out of the realm, and also of things touching war within the realm, which may not be determined or discussed by the common law, and also all appeals of offences done out of the realm, and they proceed according to the civil law. Co. Litt. 391. b.

12. If A. gives B. a mortal wound in a foreign country, and B. comes into England and dies, this cannot be tried by the common law, because the stroke was given there, whence no visne can come, but the same shall be heard and determined before the constable and marshal. 3 Inst. 48. cap. 7.

13. If a man be stricken upon the high sea, and dies of the same stroke upon the land, this cannot be enquired of by the common law, because no visne can come from the place where the stroke was given (though it were within the sea pertaining to the realm of England, and within the liegance of the king) because it is not within any of the counties of the realm; neither can the admiral hear or determine this murder, because though the stroke was within his jurisdiction, yet the death was infra corpus comitatus, whereof he cannot enquire; neither is it within the Statute 28 H. 8. because the murder was committed on the sea, but by the said act of 13 R. 2. the constable and marshal may hear and determine the same. 3 Inst. 48. cap. 7.

14. The Judges of this Court are the Lord High Constable of England, and the Earl Marshal of England, and this Court is the fountain of the marshal law; and the Earl Marshal is both one of the Judges and to see execution done. 4 Inst. 123. cap. 17.

15. This Court of Chivalry was anciently holden in the King's Hall. 4 Inst. 123. cap. 17. [504]

16. Neither

16. *Neither the Statute 26 H. 8. cap. 13. nor that of 35 H. 8. cap. 2. nor the Statute of 5 Ed. 6. cap. 11. do take away the jurisdiction of the constable and marshal where one accuses another of high treason done out of the realm, for of such an accusation of one against another of any high treason done out of the realm, the constable and marshal should have conu-
sance thereof, because high treason is not triable by a jury according to the course of the common laws of the realm in that case for want of proof.* 4 Inst. 124. cap. 17.

For more as to the Court of Chivalry before the Constable and Marshal, See 4 Inst. 123. to 130. and Prynne's Animadversions &c. on 4 Inst. 59 to 74 &c.

(K. 2) The Court of Honour.

Sid. 352.
pl. 3. the
King v.
Parker,
S. C. held
accordingly
by all the
justices,
præter
Twisden J.

1. **I**N a case where the Earl Marshal was a lunatick, it was held, that a Court of Honour, *touching arms and honour*, may be holden before the Earl Marshal only, or commissioners deputed to exercise that office; but matters relating to *life and member* must be kept before the Constable and Marshal. 1 Lev. 230, Hill. 19 & 20 Car. 2. B. R. Parker's Case.

who thought that such commissioners are illegal and grievous, as appears by the petition of right, viz. Stat. 3 Car. cap. 1.—S. C. cited Show. Rep. 353.—s Hawk. Pl. C. 14. cap. 4. S. 13. cites S. C. and says, it seems to be the better opinion of the Court, that during the lunacy of an earl marshal, it may well be holden before commissioners deputed to exercise his office; and it seems hard to say that such commissioners, founded on the plain necessity of the case, and intended to prevent a failure of justice, as to Cases of which no other Court has conu-
sance, are against the purview of the petition of right made in the 3d year of the reign of King Car. 1. which complaining that commissioners had been granted for the trial of certain capital offences, and other outrages, by the martial law, under pretence thereof divers of the king's subjects had been put to death, prays that from thenceforth no commission of like nature might issue forth to be executed as aforesaid.

2. The Court of Honour *cannot commit for painting of arms*, because that is a trade, which a person educated in it, may lawfully use; but though they may do for ordinary uses, yet, unless they are herald-painters, they cannot do it for great solemnities or funerals without licence, much less may they order the *ceremonies of funerals* without licence, but this *ought to be directed by the heralds*, as for all noblemen by Garter King of Arms, for all gentlemen on this side Trent by Clarencieux, and beyond Trent by Norroy; resolved. Lev. 230. Hill. 19 & 20 Car. 2. Parker's Case.

Show. Rep.
353. Russel
v. Oldish,
S. C. and
Holt Ch. J.
said, this
matter de-
serves de-
bate; for if

3. A libel was in the Court of Honour, setting forth, that there are three Kings at Arms, Garter, Clarencieux, and Norroy, and six heralds, skilful in descents, pedigrees, and arms, to whose offices it belongs to marshal funerals &c. and that the defendant had encroached upon their respective offices, by *painting arms, marshaling funerals &c.* The defendant for a prohibition suggested the Statute of Magna Charta,

Charta, that no man shall be disseised of his liberties, or free customs, but by judgment of his peers &c. It was insisted against the prohibition, that a Court of Honour is an ancient Court by prescription, and that being a Court of great antiquity, they have endeavoured to extend its jurisdiction, but have been restrained by several acts of parliament, and that the Statute 13 R. 2. cap. 2. declares the Earl Marshal's authority, and gives remedy if abused, but not by way of prohibition by the courts of law, but by a privy seal from the king, directed to the Earl Marshal, not to proceed; sed per Cur. if what is set forth in the libel is true, it is a wrong done to the possessions of the heralds, for which they might have an action, but here is no manner of complaint of any thing done against the rules of honour, therefore a prohibition was granted, because this matter cannot be otherwise determined. 4 Mod. 128. Trin. 4 W. & M. in B. R. Russel's Case.

these things do belong to their respective offices, then there is an action at law for the wrong, and therefore directed a prohibition, and the plaintiff to declare &c.

4. Concerning the constitution of the Court of Honour, no doubt it was formerly held before the Constable and Marshal, and so all along till 13 H. 8. when the then Constable was attainted of treason, and its being held before the Marshal alone is no ancienter than the Court of the Council of York, which obtained by encroachment only; for first it was but a commission of oyer and terminer, yet it after drew in abundance of other matter, and all by the great power of the President of the North; per Holt. And he said, he never knew what sort of jurisdiction a Court of Honour has as to matters arising within England, for the Statute of 13 R. 2. gives them authority only of matters arising out of the realm, and feats of arms within the realm, by which they would have meant coats of arms and escutcheons. And he said, the ministers of that Court understood this matter of arms well, and gave coats of arms, and kept pedigrees of families, and if they find people that assume arms, to whom arms do not belong, or at least those they assume belong not to them, their way is to post them up, but by what justice or law he could not tell. It cannot imprison, for it is no court of record. He said, it were to be wished the parliament would give them jurisdiction of words tending to disparage men of honour, and such as generally provoke gentlemen to fight. And per Cur. they have no pretence to hold plea of words. 7 Mod. 127. Hill. 1 Ann. B. R. per Holt Ch. J. in Case of Chambers v. Jennings.

5. The Court of Honour has not jurisdiction of words tending to the breach of the peace. 7 Mod. 125. 128. Hill. 1 Ann. B. R. Chambers v. Jennings.

No precedent being to be found of such a suit for

words in the Court of honour. a prohibition was granted. 2 Salk. 553. pl. 18. S. C.


 Fol. 528.

The Court of Admiralty.

See 4th Inst.
 134. cap.
 22. and see
 Frynn's
 Animad-
 versions &c.
 75. to 134.

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[1. **H**ORNE Mirror de Justices 2. b. Among the constitutions of King Alfred, one is, That the *sovereignty of all the land to the middle of the sea about the land* belongs to the king in right of his crown.]

[2. Master Selden told me, there was a *record* in Turri Londinenfi in 34 E. 1. that it was agreed by all the princes of the Christian world, that the Narrow Sea, and the sea which is about England, belongs to, and is within the jurisdiction of the King of England.]

[3. 34. Ed. 1. Rot. pat. Membrana 21. an admiral made of Dover *versus partes Occidentales usque Scotiam*, and another admiral of the Thames *versus partes Boreales usque Barwick*.]

[4. Rot. Scotiæ 4 E. 2. M. 5. Sciatis quod assignavimus &c. J. E. Admirallum & Capitaneum Flotæ nostræ Navium &c.]

[5. Rot. Scotiæ 7 E. 2. M. 7. de Capitaneo & Admirallo Flotæ Regis Navium Occidentalium constitutio.]

[6. Rot. Scotiæ 8 E. 2. Membrana 2. Willielmus de Gray Capitaneus & Admirallus Flotæ Regis versus Partes Occidentales Angliæ. Ibidem. In another place another admiral.]

[7. 2 H. 4. Rot. Parl. Numero 9, the commons pray against the Court of the Admiralty or *holding plea of matters triable before Justices*, according to the common law. But no assent to this.]

See Frynn's
 Animadver-
 sions &c.
 on 4 Inst.
 80. the same
 petition at
 large, and
 the king's
 answer.

[8. 4 H. 4. Numero 47. In a petition by the commons against the admiral, among other things, it is prayed, *that the admirals use their laws only by the law of Oleron, and the ancient laws of the sea, and by the law of England, and not by custom, or by other manner*. Vide the answer.]

[9. 4 H. 4. Numero 63. another petition, *that the admiral hold his Courts upon the sea, or upon the sea coasts, and not within a franchise or vill; and that suits commenced be determined before adjournment to another place*. But no assent to this.

(A) Of what *Things* they may hold Plea, *in respect of the Place* where they arise.

[1. 2 H. 5. cap. 16. [6] **I**T is enacted, That the conservator of the truce and safe conducts by the king assigned, shall have power to enquire of offences done against the truce and safe conduct of the king upon the high seas, out of the body of counties, and out of the franchises of the cinque ports, as the admirals of the kings of England before this time reasonably after the old customs, and late upon the main

main sea used, have done or used; and so to make process, judgment, execution &c.]

2. The Court of Admiralty cannot hold plea of any contract made upon the land beyond sea, but only of things done upon the sea. Hobart's Reports 107. between the * Spanish ambassador and Sir Richard Bingley a prohibition granted; and 109. between † Palmer and Pope a prohibition granted.

[3. [But] If a contract be made upon the sea, but it is afterwards sealed upon land, the Court of Admiralty cannot hold plea thereof. Hobart's Reports between Palmer and Pope.

104. and Ibid. 212. pl. 270. S. C. and S. P. resolved and a prohibition granted; but if it had been a writing only without seal, it had made no change as to the jurisdiction; if the contract was at land though the breach was at sea, yet because these two must concur to make the cause of suit, which is intire, the party shall be forced to sue in the King's Court, because that and the common law must prevail against other Courts and laws, and cited 48 E. 3. 2. 10 H. 7. F. N. B. 118.

* Hob. 78.
pl. 103.
S. C.
† Hob. 79.
pl. 104.
Mich. 9.
Jac. C. B.
the S. C.

Fo. 529.

Hob. 79. pl.

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4. 27 H. 8. cap. 4. *Pyracies, murders, and robberies, done upon the seas or in any haven, river, or creek, where the admiral pretends to have jurisdiction, shall be enquired and tried, &c. in such shires and places of the realm as shall be limited by the king's commission, as if done at land, and such commissions under the great seal shall be directed to the admiral, his lieutenant, or deputy, and three or four other substantial persons as the Lord Chancellor shall name, to hear and determine such offences, according to the course of the common law used for felony done within the realm.*

A murder at sea was anciently cognizable only by the civil law, but now by force of 27 H. 8. 4. and 28 H. 8. 15, it may be

tried and determined before the king's commissioners in any county of England, according to the course of the common law; yet the killing of one who dies at land of a wound received at sea, is neither determinable at common law nor by force of either of these statutes; but it seems, that it may be tried by the constable and marshal, or before commissioners appointed, in pursuance of the Statute of 33 H. 8. 23. Hawk. Pl. C. 79. cap. 31. l. 12.

5. 28 H. 8. cap. 15. s. 1. *All treasons, felonies, robberies, murders, and confederacies, committed upon the sea, or in any haven, river, creek, or place where the admirals pretend to have power or jurisdiction, shall be enquired, heard, and determined, in such shires and places of this realm, as shall be limited by the king's commissioner &c. after the common course of law used for treasons, felonies, robberies, murders, and confederacies of the same committed upon land within this realm.*

This statute as to criminal offences upon sea, is to be intended if felony be done super altum mare. For if it be committed in a creek or

place where the admiral has not jurisdiction, the commissioners have nothing to do to meddle with it; per Coke and Foster. Ow. 123. Mich. 7. Jac. in Case of Leigh v. Burley.

A pirate upon his arraignment before commissioners of oyer and terminer, stood mute and would not directly answer. Saunders Ch. B. and Brown and Dyer J. being asked their opinion, held, that he should have the pain of fort and dure; and this by the good and reasonable intendment of the Statute of 28 H. 8. cap. 15, and judgment was given accordingly. — 3 Inst. 114. S. P. but says, it is out of the latter words of the act viz. "And such as shall be convict of any such offence by verdict, confession or process." For he that standeth mute is not convict of the offence, but suffereth for his contumacy, and it is neither by verdict, confession, or process.

The commission for trial of piracy by Statute 28 H. 8. cap. 15. is good, though the Chancellor does not appoint the commissioners as that statute appoints; per Hobart Ch. J. Arg. Hob. 146. — D. 211. b. 212. a. Falch. 4. Eliz. S. P. where the nomination was by the Lord Keeper, and held good by the greater number; and this was before the Statute 5 Eliz. cap. 48.

As to criminal offences the Statute 28 H. 8. cap. 15. extends only to such which are done super altum mare, for if they are done in a creek or place where the admiral has not jurisdiction, the commissioners

commissioners have nothing to do to meddle with it; per Resser. Ow. 129. Mich. 7 Jac. in Case of Leigh v. Burley.

If an *Englishman commits piracy*, be it upon the subject of any prince or republic in amity with the crown of England, they are within the purview of the Statute of 28 H. 8. and so it was held where one WINTHROP, Smith and others, had robbed a ship of one Maturine Gantier, belonging to Bourdeaux, and bound from thence with French wines for England, and that the same was felony by the law marine, and the parties were convicted of the same. Molloy 60. cap. 4. l. 8.

So it is if the subject of any other nation or kingdom, being in amity with the King of England, commits piracy on the ships or goods of the English, the same is felony, and punishable by virtue of the statute, and so it was adjudged, where one CARLISLE, captain of a French man of war of about 40 guns, and divers others, setting upon four merchant men going from the Port of Bristol to Carmarthen, did rob them of about 1000 l. for which he and the rest were arraigned and found guilty of the piracy. Molloy 60. cap. 4. l. 9.

But before the Statute of 25 Ed. 3. if the subjects of a foreign nation and some English had joined together and had committed piracy, it had been treason in the English, and felony in the foreigners; and so it was said by Shard, where a Norman being commander of a ship, had, together with some English, committed robberies on the sea, being taken, were arraigned and found guilty; the Norman of felony, and the English of treason, who accordingly were drawn and hanged. But now at this day they both receive judgment as felons by the laws marine. Ibid.

6. A commission issued out of Chancery according to the Statute of 28 H. 8. 15. to the admiral and others, to enquire, hear, and determine all treasons, felonies &c. done within the jurisdiction of the admiralty. and they issued out a precept against Lacy, for having given a mortal stroke to J. S. upon Scarborough Sands (being a certain place in which the sea has flux and reflux), of which stroke J. S. died at Scarborough, whereupon L. was arrested and imprisoned, and arraigned thereof before the commissioners, all of which L. pleaded to a sci. fa. on a recognizance entered into by him to appear before the Justices of Assize at York, which he was prevented doing by his being so taken into custody. The Attorney General demurred to the plea, and one cause alledged was, that L. did not alledge that the coroners who enquired super visum corporis were coroners of the admiralty or of the county; but this was held not material; because the commissioners may proceed without any view of the body by any coroner. Mo. 121. pl. 265. Pasch. 25 Eliz. in the Exchequer, Lacy's Case.

7. L. gave P. a mortal stroke upon the sea, of which P. died at Scarborough, in the county of York, and L. was discharged of it; for those of the county of York could not enquire of it without enquiring of the stroke, and of the stroke they could not enquire, because it was not given within any county; and those of the admiralty jurisdiction cannot enquire of it as of a felony without enquiring of the death, and of the death they cannot enquire, because it was infra corpus comitatus, cited 2 Rep. 93. a. per Cur. as adjudged in B. R. Trin. 25 Eliz. Lacy's Case.

I.e. 270.
pl. 363.
S. C. is
that Lacy
was indicted
for the
death of a
man upon
Scarborough
Sands, be-
tween high
and low
water-mark,
which be-
ing removed into B. R. and the defendant arraigned, he pleaded that the indictment upon which he was arraigned was taken by commission 1 Maii, directed to the judges of assize, and other justices of peace in the said county, to inquire of all murders &c. and that afterwards, viz. on the 2d May issued another commission, directed to the admiral, and others, upon the Statute 28 H. 8. cap. 15; and this was ad inquirendum tam super altum mare quam super litus maris; by force of which he was indicted of the same murder. All the justices held that the first commission was repealed by the second, and so the indictment upon which he was arraigned was coram non iudice; for these two commissions are in respect of two several authorities, the first merely by the common law;

the

the other by the said statute, and therefore the party was discharged of the indictment at the suit of the queen.

8. When the sea flows and is *ad plenitudinem*, the admiral shall have jurisdiction of every thing done upon the water between the high water-mark and the low water-mark, by the ordinary and natural course of the sea; and so it was adjudged in LACY'S CASE, what the felony done upon the *ad plenitudinem maris* between the high water-mark and the low water-mark by the ordinary and natural course of the sea, the admiral shall have jurisdiction; and so between the high water-mark and the low water-mark the common law and the admiralty have *divisum imperium interchangeably*. 5 Rep. 107. a. Pasch. 43 Eliz. B. R. in Sir Hen. Constable's Case.

Mo. 121,
122. pl. 263.
Pasch. 25
Eliz. in the
Exchequer.
S. C. —
and 86.
pl. 150.
S. C.

9. Cook said, that the admiral should have no jurisdiction where a man may see from one side to the other; but the coroner of the county shall enquire of felonies committed there; which was held to be good by all other Justices; and he gave this difference, that where the place was covered over with salt water out of any county or town, there *est altum mare*; but where it is within any county, there it is not *altum mare*, but the trial shall be per vicinietum of the town. Ow. 122, 123. Mich. 7 Jac. Leigh v. Burley.

10. Great question was, if a man committeth piracy upon the sea, and one knowing thereof, receiveth and comforteth the defendant within the body of the county; if the admiral and other the commissioners, by force of 28 H. 8. cap. 16. may proceed by indictment and conviction against the receiver and abettor, inasmuch as the offence of the accessory hath the beginning within the body of the county. And it was resolved by them, that such a receiver and abettor by the common law could not be indicted or convicted, because the common law cannot take consufance of the original offence, because that is done out of the jurisdiction of the common law; and by consequence, where the common law cannot punish the principal, the same shall not punish any one as accessory to such a principal. 13 Rep. 53. pl. 21. Trin. 7 Jac. The Case of the Admiralty.

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11. Where a man may see that which is done of one part and the other of the water &c. in that place the county may have cognizance, and it may be tried by a jury; which proves also, that that which may be tried by the common law, doth not belong to the admiral's jurisdiction. 12 Rep. 80. Hill. 8 Jac. cites 8 E. 2. Corone 399, and says, that Stamford's Pleas of the Crown, lib. 1. fol. 51, citing this book, says thus, viz. So this proves that by the common law before the statute &c. the admiral shall not have jurisdiction upon the high sea, which proves that the admiral by the common law hath jurisdiction upon the high sea, and consequently that his jurisdiction was by the common law, and then it is so ancient, that the commencement cannot be known; so that Lord Coke says,

says, he concludes that, his authority did not begin in the reign of Ed. 3. as Lambert, upon uncertain conjectures suppose; for if the jurisdiction had then began and been instituted, it would have appeared upon record. 12 Rep. 80. Hill. 8 Jac. Anon.

12. The admiralty of England can hold no plea of any contract, but such as ariseth upon the sea; no, though it riseth upon any continent, port, or haven in the world out of the king's dominions; for their jurisdiction is limited by the statutes to the seas only; for the admiral is for the sea; and the court for maritime causes; and therefore if any stranger or other will seek justice at the hands of the King of England, for wrongs done him out of his dominions, he must seek it in those courts that have jurisdiction over the cause. Now, if the cause rise at land or in a port (for no port is part of the sea, but of the continent) then he cannot sue in the Admiralty, but in the courts of common law, which have unlimited power in causes transitory, and then it must be so laid, that it may give jurisdiction. Resolved clearly by the whole Court. Hob. 79. pl. 103. D'Acuna v. Jolliff and Bingley.

13. A suit was in the Admiralty for taking good circa Cape de Vert super altum mare. A prohibition was moved for, because it was in the port of Guinea when they were at anchor, and every port is within the body of the land, and not upon the high sea. Coke Ch. J. said, that peradventure the ports there are not as the havens are here. Doderidge said, that there is not any port there, but there are roads, but they are not within the body of the land but in the sea, and they may be at anchor in the sea, and therefore a prohibition was denied; but Coke said, that if it had been within the body of the land the admiral ought not to hold plea of it. Roll. Rep. 250. Mich. 13 Jac. B. R. Willet v. Newport.

14. A libel was against B. for a ship lying at anchor at Limehouse. The libel was in nature of a detinue at common law, and because this was infra corpus com. and not within the admiral's jurisdiction, a prohibition was granted. Cro. J. 514. pl. 27. Mich. 16 Jac. B. R. Violet v. Blagüe.

Mo. 891.
pl. 1255.
Anon. but
S. C. and a
prohibition
granted.—
2 Roll. Rep.
49. Violet
v. Blake. S. C. and prohibition granted; for by Doderidge Lyne House, Hull &c. are within the points of the land, and out of the jurisdiction of the admiralty, and cited a case in the time of E. 1. Avowry 192. and 46 E. 3. where trespass was brought for the taking a ship at Hull, and the mayor of Hull demanded consuance of the plea and had it, and that the book of 8 E. 3. Corone 399. was denied by the judges to be law.

15. Plaintiff may sue in the Admiral Court on a contract if he will suppose it to be made in Virginia, but if he supposes it to be made in England, he may sue here; but if part of the contract be made here and part over the sea in Virginia, or upon the sea, the common law only shall have jurisdiction; per Jones J. who said that these are the true differences. 2 Roll. Rep. 492, 493. Hill. 22 Jac. in Capp's Case.

[510] 16. It is usual in the libel to alledge some contract to be made super altum mare; but if the surmise be not true a prohibition

prohibition shall be granted. And Doderidge said, if a *ship lies at anchor, and wants victuals, and sends to land to F. S. to bring victuals, and then the contract is made in the ship*, this is a contract upon the sea, and therefore it shall be tried in the Admiralty, but contrary, if the contract is made wholly at land, and the victuals afterwards sent to the ship, Latch 11. Hill. 1 Car. Godfrey's Case:

17. A contract was made at land, with several seamen, to bring a ship from a port in England to London, for a certain sum of money to be paid to them, Upon a libel in the Admiralty for this money, it was suggested for a prohibition, that the contract was made at land, with diverse jointly for a *sum in gross*, and so could not be within the ordinary rule of mariners wages to be sued for in that Court, because there they may all join, and not be put to the inconvenience of suing severally as at law, but as this contract is, they are to sue jointly at common law; but the prohibition was denied, for this must be taken as mariners wages, and therefore the Admiralty have jurisdiction, though the contract was at land; besides, this prohibition being prayed after sentence, it is discretionary in the Court to grant it or not. 1 Vent. 343. Mich. 31 Car. 2. B. R. Anon.

18. In a prohibition to stay a suit in the Admiralty for *mariners wages*; the suggestion was, that this suit was founded on a *charter party made at land*, and not *super alium mare*; but the prohibition was denied, because wages are not due to mariners for labour done at sea, and the charter and contract made on the land, is only to ascertain them. 3 Lev. 60. Trin. 34 Car. 2. C. B. Coke v. Cretchet.

And North Ch. J. said that such was the opinion of Hale Ch. J. in his time on a conference had between

them at the desire of the Court of C. B. after the time that North was Ch. Justice of this Court; and the next day was a like case, and like rule made between Middleton and Scully.

19. Libel by two of the mariners, viz. *purser and boatswain against two of the owners of the ship, for their wages*. It was suggested for a prohibition, *that the contract was made at land*; and said, that though suits had been permitted for mariners wages, yet that was when they all joined in the suit to avoid the putting them to sue severally, as they must do at law; but here the *suit was by 2 only, and against 2*, and therefore they ought not to have the privilege of common seamen, especially since the contract with the owners is joint, and two only are sued whereby they will be charged with the whole. But a prohibition was not granted, for though the plaintiffs were purser and boatswain, &c. yet they are mariners still, and may sue in the Admiralty for wages, and the proper remedy is there; but if they do not proceed according to their law, the remedy lies here. 2 Vent. 181. Trin 2 W. & M. in C. B. Alleston v. March.

And add a note that it was said by one of the Admiralty that though the suit be against some of the owners, the course there is not to charge them with the whole, but only according to their proportionable shares.

20. A prohibition shall not go the Admiralty for *mariners wages*, though the contract was made at land; and the Court held that for the convenience of seamen the Admiralty has

12 Mod. 38. Opy v. Addison S. C. on a

motion to discharge a rule for a prohibition, but the rule was discharged. But a note is there added, that this was said to be otherwise by the Court upon a motion in *B. R. Mich. 4 Anne* in a Case between *BARR AND BARR*, which was moved by Mountague.

always been allowed to hold plea thereof, but with this limitation, that if there is any special agreement, by which the mariners are to receive their wages, in any other manner than usual; or if the agreement be under seal, so as to be more than a parol agreement, in such a case a prohibition shall be granted, and so it was granted in this case. *1 Salk. 31. pl. 1. Pasch. 5. W. & M. in B. R. Opie v. Child, & al.*

[511] 21. 11 & 12 W. 3. cap. 7. *All piracies, felonies, and robberies committed upon the sea, or in any haven, river, creek, or place where the admirals have power or jurisdiction, may be enquired of, heard, and determined in any place at sea, or upon land, in any of his majesty's dominions, forts, or factories, to be appointed by the king's commission under the great seal, or the seal of the admiralty, directed to any of the admirals, vice-admirals, rear-admirals, judges, and vice-admiralties or commanders of any of his majesty's ships of war, and also to any such persons as his majesty shall appoint; which commissioners shall have power, by warrant under the hand and seal of them, or any of them, to commit to custody any person against whom information of piracy, robbery, or felony upon the sea, shall be given upon oath, and to call a court of admiralty on shipboard, or upon land, as occasion shall require; which court shall consist of 7 persons at least.—2. If so many of the persons cannot conveniently be assembled, any 3 of them (whereof the president or chief of some English factory, or the governor, lieutenant-governor, or member of his majesty's council in any of the plantations, or commander of one of his majesty's ships, is to be one) shall have power to call any other persons on shipboard, or upon the land, to make up the number of 7.—3. Provided that no persons but known merchants, factors, or planters, or captains, lieutenants, or warrant-officers, in any of his majesty's ships of war, or captains, masters, or mates of some English ship, shall be capable of sitting and voting in the said court.*

22. *If the subjects in enmity with the crown of England, be sailors on board an English pirate with other English, and then a robbery is committed by them, and afterwards are taken, it is felony without controversy in the English, but not in the strangers; for they cannot be tried by virtue of the commission upon the statute, for it was no piracy in them, but the depredation of an enemy, for which they shall receive a trial by martial law, and judgment accordingly. Molloy 60. cap. 4. f. 10.*

23. *If one steals goods in one county, and brings them into another, the party may be indicted in either county; but if one commits piracy at sea, and brings the goods into a county in England, yet he cannot be indicted upon the statute, for that the original taking was not felony, whereof the common law took cognizance. Molloy 70. cap. 4. f. 30.*

(B.) Of

(B) Of what Things they may hold Plea.

[1. IF a man makes an agreement with another *super alium mare to carry goods to parts beyond the sea*, and after this agreement is put in writing, and sealed in a place beyond the seas upon the land, the Court of Admiralty shall not hold plea upon this agreement, for by the putting of this into a deed, the agreement is taken away, and the jurisdiction is changed thereby. Hobart's Reports 287. C. 268. between Palmer and Pope.]

Hob. Rep. 79. pl. 104. and 212. pl. 270. S. C. & S. P.

[2. But it had been otherwise, if the agreement had been put in writing without sealing thereof, Hobart's Reports 287.]

Hob. 212. pl. 270. S. C. & S. P.

[3. If an agreement be made upon land to carry some goods beyond sea, and after the goods by negligence are damaged with salt water upon the high seas, yet the Court of Admiralty cannot hold plea of this; for though the breach was upon the sea, yet there ought to be another act also to concur to make a suit, scilicet, the contract, which suit is entire, and therefore the common law shall prevail. Hobart's Reports 287. C. 268. between Palmer and Pope.]

Hob. 79. pl. 104. & 212. pl. 270. S. C. & S. P.

[4. If an agreement be made in Malaga, or other place beyond the sea, the Court of Admiralty shall not hold plea thereof. Hobart's Reports 287. between Audely and Jennings, Case 269.]

[512] S. C. cited Hob. 213. in pl. 270. prohibition was granted.

because it appeared that the agreement was made in the island of Malaga.—S. C. cited Hob. 29. 80. in pl. 104. Mich. 9 Jac. C. B. in Case Palmer v. Pope.

[5. They cannot hold plea of * wreck, for this is expressly prohibited by the † statute. Mich. 15 Car. B. R. between the Lord Admiral and Stidson, per Curiam resolved, and a prohibition granted where it was supposed to be *flotsam*; and the plaintiff and defendant there surmised it was wreck, and thereupon a prohibition granted.]

4 Inst. 134. cap. 22. S. P. so as it is not material whether the place be *infra fluxum* & *refluxum*

aque, but whether it be upon any water within any county.

* Nothing shall be said wreck, but such goods only as are cast or left upon the land by the sea; *quæ naufragio ad terram appellantur*. 5 Rep. 106. 2. — It shall not be tried in the Admiralty Court but before the King's Justices at the common law; because the wreck is ever cast upon the land. 2 Inst. 168.

† Viz. by 15 R. 3. cap. 3.—Sec (E. 3) pl. 6. S. P.

[6. If a subject of the king of Spain commits certain crimes against his king, for which all his goods are confiscated, and after he comes into England with his goods, and sells them here to a subject of our king; the ambassador of the king of Spain cannot sue in the Admiralty Court for the goods against a subject of our king; for though the goods were confiscated, yet now the property shall not be questioned but at common law. Hobart's Reports 286. * Don Alphonse the Ambassador of the King of

* Hob. 212. pl. 269. Mich. 9. Jac. S. C. — 2 Brownl. 29. Sir John Watts's Case S. C. though the goods were forfeited on Spain

the high sea, Spain v. *Cornero*; and the like between *Don Pedro* and another. Hill. 9 Jac.]

Sir John

Watts, who

was the vendee was not made a party to the suit, yet inasmuch as he bought them in market overt, and that by this suit the property will be drawn in question in the Admiralty, where it was prosecuted in the name of the Spanish ambassador, a prohibition was granted. — S. C. cited Hob. 79. pl. 104. that a prohibition was granted; for the property of goods here at land must be tried by common law, however the property is guided. — See (E. a) pl. 9. S. C.

Lat. 188.

S. C. and it

was trespass

brought for

breaking a

ship and

carrying

away the

fails, the

defendant

justified by

warrant

out of the

Admiralty

to arrest the

ship, and

in salvo cus-

todire by

force

whereof he

entered into

the ship

and carried

away the

fails, quæ

est eadem transgressio.

It was objected that the breaking the ship is not answered, and that the warrant does not give him any authority to carry any thing away. But the Court held the plea good enough, because the entering into the ship is a breaking of it in law, as a clausum fregit &c. and likewise he may carry away the fails, that being the manner of their proceedings and grounded upon reason, because he cannot in salvo custodire unless the fails are carried away.

— Godb. 385. to 390. pl. 474. S. C. argued sed adjournatur, and by the points there argued it seems that the following pleas of 8, 9, 10, and 11. belong to this case of pl. 7. and that they should have been all joined. — 3 Lev. 368. Pasch. 5th W. & M. in C. B. *Sanda qui tam* &c. v. Child, Franklin and Leach, who had sued in the Admiralty as agents in the East India Com-

[513] pany to stay the plaintiff's ship from going to the East Indies, and paid all the fees of the prosecution, and thereupon the ship was seized. After judgment for the plaintiff in C. B. Error was brought in B. R. where all the matters argued in C. B. were argued again several times in B. R. And 1st, That all this being done on the behalf of the company, the action

ought to have been brought against the company, and not against the defendants, their servants. But this was over-ruled by both Courts. For 1st, This is not like the Case in Godb. 385. where one sued in the Admiralty for another by warrant of attorney of his agent; for here it is not found

that they have any warrant of attorney, and they may do it of their own heads. But 2^{dly}, If it was by warrant of attorney of the company; yet this will not excuse the matter; because a warrant of attorney, though of the king himself, will not excuse the doing an illegal act; for though the commanders are trespassors, so are the persons also who do the act. — 4 Mod. 176. to

382. S. C.

Fol. 580.

S. C. cited

Lev. 267.

Trin. 21

Car. 2.

B. R. in

Case of Ju-

radov. Gre-

[12. If a man of Friesland sues an Englishman in Friesland before the governor there, and there recovers against him a certain sum; upon which the Englishman not having sufficient to satisfy it, comes into England, upon which the governor sends his letters missive into England, omnes magistratus infra regnum Angliæ rogans, to make execution of the said judgment. The Judge of the Admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law;

law; for this is by the law of nations, that the justice of one nation should be aiding to the justice of another nation; and for one to execute the judgment of the other; and the law of England takes notice of this law, and the Judge of the Admiralty is the proper magistrate for this purpose; for he only hath the execution of the civil law within the realm. Pasch. 5 Jac. B. R. *Wier's Case*, resolved upon an Habeas Corpus, and remained.]

gory; which was a contract made at Malaga in Spain, to take Merchandizes into a ship there, and carry them to another

place; on a libel in the Admiralty there it was suggested for a prohibition, that the contract was made upon the land, to which it was answered, that though it was so made, yet upon the suit in the Admiralty of Spain sentence was given, and the suit here is only to have execution of the sentence here, and in such case no prohibition lies; and to this the Court inclined; but then it was said, that the sentence in the principal case here in *Roll* was not peremptory and final to pay anything for non-performance, but was interlocutory only, that he shall receive and bring the goods according to the agreement, but here the suit is for damages for not receiving and carrying, for which action on the case lies; whereupon it was ruled, that the plaintiff declare upon the suggestion, so that upon the pleading the matter may come judicially in question.—Sid. 418. pl. 1. S. C. that this was on a sentence in the *Alcade*, which is the Admiralty at Malaga, and a prohibition was granted for the same reason, and also, for that the *Alcade* is not as Admiralty here; and on another motion afterwards for a consultation, the same was not granted for the same reasons.—Vent. 32. S. C. and because the sentence was not complete, but only an award that the merchandizes should be received; a prohibition was granted.

Upon a judgment given in the Court of Admiralty they may sue out an execution thereof in foreign parts, as in France &c. Per Dr. Steward, who at the desire of the Court of C. B. delivered his opinion there. Godh. 260. pl. 369. Mich. 10 Jac. in the Case of *Greenway v. Barker*.

[13. If a merchant of Holland brings trespass against J. S. for a ship laden with merchandizes, & quia non liquet quæ bona fuerunt in navi prædicta, quando de partibus Hollandiæ versus regnum istud iter suum cepit, mandatum est comiti Hollandiæ; quod per probos & legales homines & mercatores terræ suæ, ubi prædictus querens se in mari posuit inquirat diligenter quæ mercimonia carrucata fuerunt &c. & inquisitionem aperte & fideliter faciam remanet domino regi, &c. 22 Ed. 1. Liber Parlamento- rum 65. b.]

14. Libel before the Mayor of Hull as admiral there against an administrator for 5l. for smith's work done for the intestate, in mending a ship for him, and said, that he arrested the ship within the admiral of England's jurisdiction. The defendant pleaded fully administered. A prohibition was prayed, 1st, Because it is not shewn that the ship was arrested within the jurisdiction of the Mayor of Hull. 2dly, Because action on the case lies at common law for this debt. 3dly, Because the plea of fully administered is triable only at common law; and for these reasons a prohibition was granted. Litt. Rep. 166. Mich. 4 Car. C. B. *Ashton's Case*.

15. On a motion for a prohibition to a suit in the Admiralty for mariners wages, it was agreed, that if a ship does not return, but perishes by tempest, enemies, fire &c. the mariners lose their wages, for otherwise they would not endeavour nor hazard their lives to preserve the ship. Sid. 179. pl. 14. Hill. 15 & 16 Car. 2. B. R. Anon.

[514] Keb. 684. pl. 87. Blackwell v. Clarke, seems to be S. C. and because it was founded

on a specialty made on land, and the custom of merchants is, that unless the ship comes home the wages is payable to them, and consequently not to their executors or administrators, and this

plea was disallowed in the Admiralty, and so it is suggested, the Court granted a prohibition notwithstanding sentence and appeal, it being contrary to a verdict at law and not had on due proofs, but contrary to the plea pleaded.

A prohibition shall not go to the Admiralty to stay a suit there for *mariner's wages*, though the contract were upon the land. First, it is more convenient for them to sue there, because they may all join. Again, according to their law, if the ship perish by the mariner's default, they are to lose their wages; therefore in this special case the suit shall be suffered to proceed there. Vent. 146. Trin. 28. Car. 2. B. R. Anon.

16. A part owner of a ship sued the other owners for his share of the freight of the ship which had finished a voyage; but the other owners did set her out, and the plaintiff would not join with the rest on setting her out, or in the charge thereof; whereupon the other owners complained thereupon in the Admiralty, and by order there the other owners gave security that if the ship perished in the voyage, to make good to the plaintiff his share; and if she returned, to restore his share, or to that effect; and in such case by the law-marine and course of the Admiralty, the plaintiff was to have no share of the freight. It was referred to Sir Lionel Jenkins to certify the course of the Admiralty, who certified accordingly; and that it was so in all places, and otherwise there could be no navigation; whereupon now the 13th of July the plaintiff was dismissed. 2 Chan. Cases. 36. Trin. 32 Car. 2. Anon.

Show. 18. S. C. but S. P. does not appear. — Comb. 109. Knight v. Perry S. C. & S. P. and a prohibition granted.

17. The major part of the part owners of a ship agreed to send her a voyage, but the others disagreeing, the major part according to the common usage suggest this in the Admiralty Court, and then (as usual) they order certain persons to appraise the ship, and then the major part enter into a recognizance jointly and severally to the others in a sum proportionable to their shares against all adventures; afterwards B. one of the disagreeing partners, took out a sci. fa. against K. upon the recognizance, and sentence was had against him in the Admiralty Court. K. moved for a prohibition, for that the Admiralty had no jurisdiction in this case, and so all was done coram non iudice; and the whole Court held that the Admiralty had no consueance of this matter, and thereupon a prohibition was granted. Carth. 26. Pasch. 1 W. & M. in B. R. Knight v. Berry.

Carth. 166. S. C. and a prohibition granted on amending the suggestion by adding a refusal of the plea. — Show. 179. adds a note, that their course is not to receive a plea without bringing the sails into Court, viz. into the custody of the officer; and then they will admit a claim and contest of property.

18. In case of *mariners wages* the Admiralty has jurisdiction. They may sell the ship, and the sails and tackle are part of it, and remain part when they are on shore, and they may proceed against them; but if property be pleaded they must and will allow it, if it be pleaded otherwise a prohibition will be granted, per Holt Ch. J. whereupon the suggestion was altered, and an offer alledged of a plea claiming property, and that the plea was refused, and then a prohibition was granted. Show. 177. 179. Mich. 2 W. & M. Edmondson v. Walker.

12 Mod. 440. Grant v. Bailey

19. The mate sued the master for his wages in the Admiralty, and Mr. Raymond moved for a prohibition, because the master himself

himself could not sue there, and the mate was not in nature of a mariner, but was to succeed the master if he died in the voyage. Denied per Holt Ch. J. for the master contracts with the owner, but the mate contracts with the master for his wages, as the rest of the mariners do. 1 Salk. 33. pl. 5. Trin. 12 W. 3. B. R. Baily v. Grant.

S. C. per Cur. it ought to go in the case [515] of a master, but otherwise in case of mariners,

and the mate being a mean between both it was doubted, but the Court inclined to consider him as a mariner, because he is hired by the master as other mariners are; but the master is put in by the owners. And after, upon conference with C. B. where a like case was under consideration, it was ruled that no prohibition should go. — Lord Raym. Rep. 632. S. C. ruled accordingly.

20. By the course of the Admiralty they decree, that where there are several owners of a ship, and some are for freighting and some against it, that the majority shall prevail, giving the others caution for their respective parts against all risks, which was done in the present case, and the ship being lost, they libelled for the caution and had a sentence; and upon a motion for a prohibition, suggesting, that this caution was given at land, and that all matters of property are to be ordered by the common law; the Court seemed strong that they had such a power, and consequently have jurisdiction over the caution as incident, yet it being a matter of consequence, and never yet determined, they granted a prohibition, and directed them to declare upon their suggestion. 6 Mod. 162. Pasch. 3 Ann. B. R. More v. Rowbotham.

(B. 2) Court of Admiralty. Of what they may hold Plea in respect of the Things. Incidents and Consequences.

1. ONE Butler, and others, upon the sea near the coast of Suffolk robbed the queen's subjects, and brought the goods into Norfolk, where they were apprehended. At the Norfolk assizes Wray Ch. J. and Periam J. were of opinion, that because the common law did not take notice of the original offence, (viz.) of the piracy, therefore the bringing those goods to the land which they had taken by piracy on the sea, did not make the same punishable at the common law, and thereupon they were committed to the vice-admiral of those counties. 13 Rep. 53. cites 28 Eliz. Butler's Case.

2. One who had letters of marque &c. in the Dutch war, took an Offender at sea, instead of a Dutch ship, and brought her into port, and libelled against her to have her condemned as a prize, but sentence there that she was not a prize; whereupon the Offender libelled against the captor for damages for the hurt the ship received in the port. A prohibition was moved for, because the suit was for damages done in the port, for which action lies at common law; but it was denied, because the original cause being a taking at sea, and the carrying into the port in

Sid. 367. pl. 3. Turner v. Smith, S. C. but not exactly S. P. — a Keb. 360. pl. 4. Turner v. Neate, S. C. and Ibid. 364.

pl. 16. S. C. & S. P. and per Cur. the rule for prohibition was discharged.

Vent. 178. Radley v. Eggesfield, S. C. was an action upon the Stat. 13 R.

[516]

2. cap. 5.

and 2 H. 4.

cap. 11. for

suing the

plaintiff in

the Admiralty for

the ship M.

pretending

she was

taken pirate,

whereas

as the plain-

tiff bought her *infra corpus comitatus*.

The defendant pleaded not guilty to the action, and upon

the trial would not examine any witnesses, but prayed the opinion of the Court, who said there

was good cause upon the libel (which now they must take to be true) in the first instance for the

Admiralty to proceed. — 2 Saund. 259, 260. S. C. held, that the defendants were not

within the penalty or meaning of the said statutes; and denied. Hob. 78. and 113. Bingley's Case.

— 2 Keb. 328. pl. 48. Radley v. Whitwell, S. C. & S. P. agreed.

order to have her condemned as a prize but a consequent thereof, *not only the original, but the consequents also shall be tried there.* 1 Lev. 243. Trin. 20 Car. 2. B. R. Turner v. Neale.

3. *Goods were taken by pirates as the libel supposed, and condemned in Scotland; but it appeared that they were contraband goods, going to the Dutch in the war between the Dutch and English, and taken by a Scotch man of war. The goods were afterwards brought into England and sold, and a suit was for them in the Admiralty here after the sale. The Court agreed that this is not within the statute [13 R. 2. or H. 4.] for the original cause being of piracy belonged to the Admiralty, and the condemnation in the Admiralty of Scotland alters not the case as to the jurisdiction of the Court, but was pleadable in the Admiralty in England. But neither this nor the sale at land will alter the jurisdiction, the original matter being piracy, which all comes in question again, and the sale at land is a matter consequential on the piracy, and depending on it.* 2 Lev. 25. Trin, 23 Car. 2. B. R. Ridley v. Eggesfield.

4. A libel was for a *ship taken by pirates and carried to Tunis, and there sold.* A prohibition was prayed, for that *the ship was sold at land, and so that Court had no jurisdiction.* Per Cur. in regard it was taken by pirates it is originally within the Admiral's jurisdiction, and so continues, notwithstanding the sale afterwards at land; otherwise where a ship is taken by enemies, for that alters the property. But because no mention was made in the libel that the ship was taken *super altum mare*, and though there was very much contained therein to imply it, yet the Court held that to be absolutely necessary to support their jurisdiction. 1 Vent. 308. Pasch. 29 Car. 2. B. R. Ridley v. Eggesfield.

5. *Wherever they have not original jurisdiction of the cause, though there arises a question in it that is proper for their cognisance, yet that alters not, nor takes away the power of the common law; but if they have jurisdiction of the original, though a question arises proper for the common law, yet they shall try that; and after sentence, if it appear that the matter contained in the libel is triable at law, we will grant a prohibition; per Holt Ch. J. Comb. 462, 463. Mich. 9 W. 3. B. R. in Case of Tremoulin v. Sands.*

6. *W. built a ship and launched her, and after upon a treaty with B. for the ship, but before any bill of sale executed, B. hires O. and other seamen to launch and rig the ship, and to go a voyage proposed*

12 Mod.
144. S. C.
& S. P.
Per Holt
Ch. J.

6 Mod. 238.
S. C. mentions it as
a contract.

propoſed with him, and ſends them aboard, and W. permitted them to come aboard, and there they continued 4 months fitting the ſhip out to ſea, but ſome difference ariſing between W. and B. the treaty broke off, and the ſeamen were diſmiſſed, who li- belled againſt the ſhip for their wages. The defendant ſug- geſted for a prohibition, that the work was done infra corpus com. &c. and that the ſhip did not proceed in her voyage, but the prohibition was denied; for W. the builder, by per- mitting the ſeamen to be put on board, conſents to the charge upon the ſhip, and by his own act makes it liable to the wages; and there is no reaſon to conſider the builder; for when he truſts the contractor ſo far as to let the ſeamen go aboard, there is no reaſon to help him. 2 Lord Raym. Rep. 1044. Mich. 3 Ann. Wells v. Ofman.

by the builder with the owner, and a prohibition was denied. The Court ſaid the caſe would have been other- wiſe if the retainers of the ſeamen had been only to do the work in the harbour.

(C) Admiral Law.

[517]

[1.] *If the owner of a ſhip viſtuals it, and furniſhes it to ſea with letters of reſpriſal, and the maſter and mariners, when they are at ſea, commit piracy upon a friend of the king, without the notice or aſſent of the owner, yet by this the owner ſhall loſe his ſhip by the admiral law, and our law ought to take notice thereof. Trin. * 3 Jac. B. R. per Popham. Trin. 12 Jac. B. per Winch, ſaid that he had known it to be ſo alſo + Hill. 13 Jac. B. R. 21 Jac. held by Coke in the Lower Houſe of Parliament.]*

* The caſe was, the owner of a ſhip in the time of queen Eliz. furniſhed it to ſea, with letters of marque to take the goods of the

Spaniards, the queen's enemies. The marines and ſoldiers, without his directions, took a French ſhip and the goods in it, the Frenchmen being in peace with the queen. The point was, if the owner of the ſhip ſhould answer for thoſe goods? It was ſaid by Popham Ch. J. that where the maſter ſends his ſervant to do an unlawful act, there the maſter ſhall answer for the ſervant, not where he ſends his ſervant to do an lawful act, as here, the taking of the goods of the queen's enemies; there, although he miſtakes and takes the goods of the queen's friends, the maſter ſhall not answer for the goods. Quære, for that the civil law is, that the maſter ſhall answer in all publick caſes. Mo. 776. pl. 1076. 1 Jac. Waltham v. Mulgar.

[2. *If the maſter of the ſhip pawns the ſhip ſuper altum mare, ſcilicet hipothecando) for tackling and viſtuals, without the aſſent of the owner, yet this ſhall bind the owner by the admiral law; for this is allowed for the neceſſity, and our law ought to take notice thereof. Tr. 12 Jac. B. between Barnard and Bridgman, per Curiam, Hobart's Reports 17, the ſame Caſe; but it was there reſolved, that it had been otherwiſe if the maſter had pawned it for his own debts.]*

Hob: 11, 12. pl. 23. Bridgman's Caſe S. C. — Mo. 912. pl. 1308. S. C. reſolv- ed accord- ingly. — See tit. Hypotheca- tion (A)

pl. ——— a Sid. 161. Trin. 1659. Watſon v. Warner, upon a charter-party between the maſter and another concerning freight, a libel was exhibited in the Admiralty, but it was inſiſted for prohibition, that though the ſhip ſhould be liable for things bought by the maſter neceſſary for the ſhip, as ropes, ſails &c. yet it ſhould not be liable for things collateral, as a covenant for loading. Newgate J. ſaid, that by the rules of the Admiralty they may attach not only the ſhip, but the perſon alſo, as it had been lately agreed; but that to do ſo in the principal caſe would be perilous, if the maſter, who is not owner, but receives wages of him, ſhall make the owner liable to his charges upon the ſhip; and therefore ordered a ſuggeſtion to be put in that the other might plead demur. — See tit. Hypothecation.

[3. If

Molloy, lib.
2. cap. 2.
f. 13. cites
S. C.

[3. If an *infant*, being a *master of a ship at St. Christopher's*, beyond sea, by contract with another, undertakes to carry certain goods from St. Christopher's to England, and there to deliver them; but does not afterwards deliver them according to the agreement, but wastes and consumes them, he may be sued for the goods in the Court of Admiralty, though he be an infant, for this suit is but in nature of a detinue, or trover and conversion at the common law. Pasch. 11 Car. B. R. between *Furns and Smith*, per Curiam; a Prohibition denied for the Cause aforesaid.]

Hob. 78.
pl. 108.
S. C.

Cro. E.

685. pl. 26.

Tinn. 41.

Eliz. C. B.

Anon. The

goods taken

at sea were

sold at

land to the

master of

the ship, who

was not present

at the taking.

All the Court

resolved, that

a suit in the

Admiralty

well lies; for

when the goods

are tortiously

taken on the

sea by piracy,

it gains not

any property

in them against

the owner; and

being sold on

the land, unless

in a

market overt,

does not alter

the property

against the

owner finding

them in his

possession is

suf-

ficient; for

though the

Admiralty has

no authority

to meddle with

things upon

the land, yet

when the

original cause

arises on the

sea, and other

matters hap-

pen on the

land depending

on the original

cause, those

matters, though

done upon

the land, shall

be tried in the

[4. If a man commits piracy upon the subjects of another king, who is in league with us, and brings the goods into England, and sells them here in a market overt, though by the admiral law this sale shall not bind, but that the owner may retake them; yet by the common law this sale shall bind him, and the law of the Admiralty ought to take notice of this. Mich. 13 Jac. B. in *Sir Richard Bingley's Case*, per Curiam, and there said per Warburton, that this was the Case of the Merchants of Barnstaple ruled.]

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any property in them against the owner; and being sold on the land, unless in a market overt, does not alter the property against the owner finding them in his possession is sufficient; for though the Admiralty has no authority to meddle with things upon the land, yet when the original cause arises on the sea, and other matters happen on the land depending on the original cause, those matters, though done upon the land, shall be tried in the Admiral's Court; and this sale, though made in a market overt, being void because it was made to the owner of the ship, and party to the charge thereof, and so to be intended party to the tort, a consultation was awarded. 2 Saund. 260. Mich. 22 Car. 2. in *Case of Radley v. Eggesfield*, the Court denied the *Case of Bingley* in Hob. 78. and said, that where a spoliation upon the sea is the original foundation of the suit in the Admiralty, the Admiralty shall proceed to try and determine it notwithstanding any other claims property by sale made upon the land after such spoliation supposed to be made. Vent. 308. Pasch. 29 Car. 2. B. R. *Anon.* S. P. of a ship taken by pirates and sold at Tunis held accordingly, but that otherwise it is where a ship is taken * by enemies, for that alters the property, and that so was the opinion of Lord Hale in *Eggesfield's Case*, contrary to Lord Hobart in the *Spanish Ambassador's Case*, 78. and cited Cro. E. 685. But afterwards it was observed upon the libel, that no mention was made that the ship was taken *super altum mare*, and though very much was contained therein to imply it, yet the Court held it to be absolutely necessary to support their jurisdiction.

* 2 Brownl. 11 Mich. 8 Jac. B. R. *Weston's Case*, S. P. and a prohibition granted, and cited 7 E. 4. 14. Fitzh. Barré, pl. 90. cites S. C. that in such case the captor shall have the ship, and not the king, nor the admiral, nor the party whose property it was before, because it came not freshly the same day that it was taken from him, before sun-set, and claimed it.

5. The civil law is, that if two ships meet at sea together; although they do not go forth as consorts, and the one ship in the presence of the other takes a ship with goods in it, the other ship shall have the moiety, or one half of the ship and goods taken; for although it did not take the ship, yet the presence thereof there at the time of the taking was a terror to the other ship which was taken, sine quo, the other ship could not be so easily taken. 2 Le 182. pl. 224. 32 Eliz. C. B. *Somers v. Buckley*.

6. The King of England being in amity with the King of Spain, and the Hollanders &c. and there being an amity between those

those of Holland and the Spaniards; one of Holland, upon the high seas in aperto prelio took the goods of a subject of Spain, and brought them into England infra corpus comitatus, and for that the goods were in solo amici, the Spaniard libelled for them in the Admiral Court; but it was resolved per tot. Cur. B. R. upon conference, that the Spaniard had lost the property of the goods for ever, and had no remedy for them in England; for he that will sue for goods robbed at sea, ought by law to prove two things: 1st, That the sovereign of the plaintiff was, at the time of the taking, in amity with the King of England. 2dly, That he that took the goods was, at the time of the taking, in amity with the sovereign of him whose goods were taken; for every enemy may lawfully take of another, and therefore the Dutchman could not be guilty of any deprivation or robbery, but of a lawful taking; and it was resolved further, that the goods so taken being within this realm infra corpus comitatus in solo amici, if the Spaniard sue for them civiliter in the Court of Admiralty, that a prohibition should be granted, and that it should be determined by the laws and statutes of England, and not by the civil law. 4 Inst. 154. cap. 26 cites Trin. 2 Jac.

3. *An English ship is taken by an enemy, and is afterwards retaken by an Englishman; the owner of the ship cannot sue for it in the Admiralty, because the ship was gained by battle of an enemy, and neither the king, nor the admiral, nor the parties to whom the property was before shall have that. 2 Brownl. 11 Mich. 8 Jac. Weston's Case.*

8. *If any injury, robbery, felony, or other offence be done upon the high seas, lex terræ extends not to it, therefore the admiral has cognisance thereof, and may proceed, according to the marine law, by imprisonment of the body, and other proceedings, as have been allowed by the laws of the realm. 2 Inst. 11.*

9. *If a ship be taken by letters of mart, and be not brought infra præsidia of that king by whose subjects it was taken, it is no lawful prize, and the property not altered, and therefore a sale made thereof is void; agreed per Cur. absente Reeve J. Mar. 116, 111. pl. 188. Trin. 17 Car.* [519]

10. *Though a ship coming from a foreign kingdom be in a case of inevitable danger, and the tackle damaged and broken, and no probability of saving any part of it, partly in respect of the tempest, and partly in respect of the barbarity of the inhabitant, who carry away every thing cast upon the shore, yet in such case the master without the owners cannot sell the ship; per Lord Ch. B. Hale, after several arguments before him. Sid. 453. pl. 20. Pasch. 22 Car. 2. Tremenhare v. Tremellan.*

11. *If a mariner or ship-carpenter runs away he loses his wages due; per Twifden, which Hale granted. Mod. 93. pl. 2. Pasch. 24 Car. 2. B. R. Anon.*

Raym. 473.
S. C. held
according-
ly. — s
Show. 238.

12. Sentences in Courts of Admiralty ought to *bind generally* according to *jus gentium*; per Cur. Skin. 59. Mich. 34 Car. 2. B. R. in Case of Hughes and Cornelius.

pl. 228. S. C. and per Cur. It is but agreeable with the law of nations, that we should take notice and approve of the laws of the countries in such particulars; and if you are aggrieved you must apply to the king and council as being a matter of government, and he will recommend it to his liege ambassador if he sees cause; and if not remedied, he may grant letters of mart and reprisal; and this case was resolved by all the Court upon solemn debate. This being of an English ship taken by the French, and as a Dutch ship in time of war between the Dutch and French; and Judgment for the defendants, who had had a sentence for the ship and goods in the Admiralty Court in France. — S. C. cited Show. 143.

13. *Piracy committed by the subjects of the French king, or of any other prince or republick, in amity with the crown of England upon the British seas, are punishable properly by the crown of England only, for the kings of the same have istud regimen & dominium exclusive of the Kings of France, and all other princes and states whatsoever.* Molloy 60, 61. cap. 4. f. 11.

14. *Prize or no prize, is a matter not triable at common law, but altogether appropriated to the jurisdiction of the Admiralty.* Comb. 474. Hill. 10 W. 3. In the Exchequer. Brown v. Franklyn.

15. The defendant was in execution in the prison of the Admiralty, upon a sentence given against him in that Court; and an hab. corp. issued to remove him from thence; to answer an action in B. R. and upon the return it was moved that he might be committed to the marshal. For he was not chargeable in the Admiralty prison, and there ought not to be a failure of justice. But Holt Ch. J. said, that this was new; that though the Admiralty proceedings were by the civil law, yet they were supported by the custom of the realm, and this Court must not elude their process; besides, there was no action depending in B. R. And the defendant was remanded. 1 Salk. 351. Trin. 1 Ann. B. R. Keache's Case.

Fol. 531.

(D) How they may proceed there,

Godb. 193.
pl. 275. and
Ibid. 260.
pl. 35a.
Mich. 10
[520]
Jac. C. B.
Greenway
v. Baker.

[1.] If a *libel* be in the Court of Admiralty touching goods *supposed to come to the defendant by depredation*, and the defendant obliges himself, his goods and his heirs, to answer the action, and after the defendant does not obey the Court, there they may take his body, for every Court hath his several course of proceedings, and this is the usage there. Mich. 10 Jac. B. dubitatur.]

S. C. argued and civilians at the request of the Court delivered their opinions, and Coke Ch. J. agreed that the Admiralty might take the body in execution, which are for the most part the masters of the ships and merchants, who are transients, and therefore if they should not arrest their bodies, they might perhaps many times lose the benefit of their suits; but he said, that they could not in any case take forth execution upon lands; but the principal case was adjourned. — Dr. Admiral &c. pl. 1. cites 19 H. 6, 7. — See S. C. sup. at (A. 2).

[2. So

[2. So in the said case, if the defendants found *side-jurors*, and after sentence passed for the plaintiff, the bodies of the *side-jurors*, by the law of the Admiralty, may be taken in execution; for this is the usage there. *Hill, 10 Jac. between Legiers and Greenwood, plaintiffs, and Baker, defendant, and prohibition denied.*]

The Court of Admiralty proceeding by the civil law is no Court of Record and therefore cannot

take any such recognizance as a Court of Record may do; and for taking recognizances against the laws of the realm, we find that prohibitions have been granted, as by law they ought. 4 Inst. 233. cap. 22.—But per Holt Ch. J. the Court of Admiralty may take stipulations for bail, and proceed on them; and it was constantly allowed, though 4 Inst. 233. is of another opinion: 2 Ld. Raym. 186. Palch. 6 Ann.

3. 15 R. 2. cap. 3. f. 1. Item, at the great and grievous complaint of all the commons made to our lord the king in this present parliament, for that the admirals and their deputies do increase to them divers jurisdictions, franchises, and many other profits pertaining to our lord the king, and to other lords, cities, and boroughs, besides those they were wont or ought to have of right, to the great oppression and impoverishment of all the commons of the land, and hindrance and loss of the king's profits, and of many other lords, cities, and boroughs through the realm.

4. S. 2. It is declared, ordained, and established, that of all manner of contracts, pleas, and quarrels, and of all other things done rising within the bodies of counties, as well by land as by water, and also* wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction; but all such manner of contracts, pleas, and quarrels, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea shall be tried, determined, discussed, and remedied by the laws of the land, and not before, nor by the admiral, nor his lieutenant in any wise.

**Trespass of
taking five
cows and
twenty
sheep.**

Yelverton said, such a day and year the defendant affirmed plaintiff of trespass in the Court

of Admiralty before W. I. Reward of R. Earl of H. against the plaintiff, of trespass *were upon the sea*, and had citation to cite the plaintiff to appear before the Reward such a day, directed to the defendant to serve the citation; and at the day the now plaintiff made default, and that by the usage of the Court he shall be amerced for such defaults by discretion of the steward to the use of the plaintiff, by which he was amerced at 20 marks, wherefore this defendant was commanded to levy it of his goods for the said sum; by which he, the day; year, and place in the declaration, took the goods in execution for the said sum; judgment si actio; per Fortescue; he shall not meddle upon the land; but upon the sea. Per Newton; the statute restrains him that he shall not hold plea of a thing arising within the body of the county; but it does not restrain him to make execution upon the land; and they may take his body in execution upon the land. And the same law of his goods, and so was the opinion of all the Court. And at this day they serve their citations upon the land. Br. Admirals &c. pl. 1. cites 11 H. 6. 7. — S. C. cited 13 Rep. 53. pl. 21. Trin. 7 Jac. in the Case of the Admiralty, and resolved there that the statutes of R. 2. and H. 4. are to be intended of a power to hold plea, and not of a power to award execution, viz. de jurisdictione tenendi placita; not de jurisdictione exequendi; for notwithstanding the said statutes, the judges of the Admiralty may do execution within the body of the county. S. C. cited Cro. E. 685. per Cur. in pl. 20. — S. C. cited 2 Brownl. 26 Trin. 9. Jac. in Case of the Admiral Court — S. C. cited 2 Infl. 51.

* Where it provided by this statute 'that the Admiral's Court shall not have jurisdiction or continuance of wreck of the sea, yet he shall have continuance of *flotum, jettum & legum*; for wreck of sea is when the goods are cast by sea upon the land, and so infra corpus comitatus, whereof the common law takes cognizance; but the other three are all upon the sea, and therefore of them the admiral has jurisdiction; per Cur. 3 Rep. 106. b. in Sir Henry Constable's Case cites Bract. lib. 3. fol. 120. — S. P. admitted as to *Flotum, Jettum and Legum*. Raym. 96. Hill. 17 Jac. B. R.

5. S. 3. *Nevertheless, of the death of a man, and of a maim done in great ships, being and hovering in the main stream of great rivers, only beneath the * bridge of the same rivers nigh to the sea, and in no other places of the same rivers, the admirals shall have cognizance, and also to arrest ships in the great flotes for the great voyages of the king and of the realm; saving always to the king all manner of forfeitures and profits thereof coming.*

* Ow. 122. Mich. 7 Jac. in Case of Leigh v. Burleigh, per Cur. the translator of this statute mistook bridges for points, that is to say, the land's end. — Cuy's Abridgment, tit. Admiralty calls it Ports.

6. S. 4. *And he shall have also jurisdiction upon the said flotes, during the said voyages only, saving always to the lords, cities, and boroughs, their liberties and franchises.*

7. 13 R. 2. cap. 5. s. 1. *Item, forasmuch as a great and common clamour and complaint hath been oftentimes made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office, in prejudice of our lord the king, and the common law of the realm, and in diminishing of divers franchises, and in destruction and impoverishing of the common people.*

It was agreed that by this statute the admiral is prohibited intermeddling with

8. S. 2. *It is accorded and assented, that the admirals and their deputies shall not meddle from henceforth of any thing done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the Noble Prince King Edward, grandfather of our lord the king that now is.*

any thing within the body of the county as all havens are, and therefore havens are not within the Admiralty, but all the land upon which the sea-water flows and reflows is within the jurisdiction of the admiral. Mo. 122. in pl. 265. Pasch. 25 Eliz. — All rivers and havens are within the county. 4 Inst. 137. &c. cap. 22. — All the ports and havens within England are infra corpus comitatus: per Coke Ch. J. and vouched 23 H. 6. and 30 H. 6. Holland's Case, who was Earl of Exeter and Admiral of England, and because he held plea in the Court of Admiralty of a thing done infra portum de Hull. Damages were recovered against him of 2000 l. Godb. 261.

It is no part of the sea where one may see what is done of the one part of the water and of the other; as to see from one land to the other. 4 Inst. 140. cap. 22 citat 8 E. 2. tit. Coronac. 399.

If an erroneous sentence be given in the Admiralty no writ of error lies, but an appeal before the delegates, as appears by the Statute 8 Eliz. cap. 5. 4 Inst. 135. cap. 22.

9. 8 Eliz. cap. 5. *Every judgment and sentence definitive given in any civil and marine cause, upon appeal to the queen in the Court of Chancery, by commissioners or delegates nominated by her majesty, shall be final.*

10. *The proceedings in the Court of the Admiralty are according to the course of the civil law, and therefore the Court is not of record, and by consequence cannot assess any fine in such case, as Judges of a Court of Record may do.* 12 Rep. 104. Hill. 2 Jac. Tomlinson v. Philips.

Noy. 121. S. C. — See Stat. 11 & 12 W. 3.

11. *E. was committed on an indictment of piracy, and S. assisted him with ropes, and other engines, to make his escape, whereupon the Judge of the Admiralty committed S. to the Marshalsea,*

Malfea. Upon a habeas corpus out of B. R. and the cause returned as before, the whole Court held, that though all the fact done by S. was upon the land, and within the body of the county, yet *because it depends on the piracy committed by E. with which the temporal Judges have nothing to do, he was remanded*; for he is quasi an accessory to the first piracy, and determinable by the admiral; as if *sentence is given in the Admiralty for a marine cause, the execution of this sentence, either by the body, or by the goods of the party condemned, extends throughout the realm of England for the Court of the Admiralty, because it depends on the principal and first sentence.* Yelv. 134, 135. Mich. 6 Jac. B. R. Scadding's Case.

cap. 7. f. 9
and 8 Geo. 1.
cap. 24.
f. 3. at
tit. Pirates
and Piracy
(E)

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12. Though the Court of Admiralty is not a court of record, because they proceed according to the civil law, according to Br. Error, pl. 77. [177.] yet by custom of the Court they may *amercer the defendant for his default* at their discretion. 13 Rep. 53. Trin. 7 Jac. in the Case of the Admiralty.

13. The Admiralty cannot punish by imprisonment, pecuniary punishment, nor otherwise. 2 Brownl. 13. Hill. 8 Jac. per Cur. in Case of the Master &c. of Trinity House v. Boreman.

14. A recognizance taken in the Court of Admiralty to stand to the order of the Court is void; per Serjeant Harris, Arg. said it had been so adjudged; and per Warburton it is not a court of record. Noy 24. Record v. Jobson.

S. C. cited
Raym. 78.
Pasch. 15
Car. a. B. R.
in Case of
Par v.

Evans, where a prohibition was prayed to the Court of Admiralty, for that the plaintiff here did sue upon a recognizance there taken by way of stipulation by one that was but surety in the nature of bail, and that Court not being a Court of Record, they cannot take any recognizance; but after long debate resolved, in favour of trade, such a stipulation is good, and shall bind the sureties. — Ibid. cites Godb. 260. pl. 359. Greenway v. Baker.

* Keb. 552. pl. 62. Pane v. Evans, S. C. and the Court said, that as this Case is, should we grant a prohibition, we should overthrow the whole Court.

15. A man was taken by a warrant issued out of the Admiralty, and rescued out of the messenger's hands, for which the person, who made the rescous, was arrested for a contempt to the Court, in a suit depending there between him and another. Roll. Ch. J. said, that if the cause was maritime the Admiralty might examine a contempt in that cause, but they cannot proceed criminally against the rescuer of him that did the contempt, and ordered cause to be shewn why a prohibition should not go. Sty. 171. Mich. 1649. Anon.

Sty. 340.
Mich. 1652
B. R. Tench
v. Hubrisoa,
the Court
held, that
the Admir-
alty cannot
proceed cri-
minally
against one
that is in
contempt to

the Court, but said, they would hear civilians if they would speak to it the Saturday following.

16. The Court of Admiralty may punish such as resist the process of that Court, and may fine and imprison for a contempt to it acted in the face of it, though they are no court of record; but if they should proceed to give the party damages, a prohibition would be granted quoad that; per Cur. Vent. 1 Mich. 20 Car. 2. B. R. Sparks v. Martin.

But the par-
ties after-
wards put
into their
suggestion,
that the ori-
ginal cause,
on which
Ibid.

the process was grounded, was a matter wherein the Court of Admiralty had no cognizance; and therefore a prohibition was granted; for then the rescous could be no contempt.

17. When

17. When a *provisionate decree*, as they call it, or *primum decretum*, is made (which is a decree of the possession of the ship), and the ship is so seized, it is the course of the Admiralty, upon security given, to suffer her to be hired out; sic dictum fuit. Vent. 174. Mich. 23 Car. 2. B. R. in Case of Radley v. Eggesfield.

Mo. 815.
pl. 1108. in
Case of the
Spanish
Ambassador
v. Plage,
sentence was
given for

18. But upon such decree an *appeal* being to the delegates, and Lord Keeper being informed that no appeal lay to them upon it, because it was only an *interlocutory decree*, upon hearing counsel he superseded the commission. Vent. 174. in Case of Radley v. Eggesfield.

the King of Spain to have the goods, but the Court did not determine the interest and right of them, upon which sentence the defendant sued to the Lord Chancellor for an appeal; but it was alledged, that it did not lie, the sentence being only of the possession, and not of the right or interest, and thereupon the Lord Chancellor doubting heard counsel, and at length he went into his closet, and brought thence a book of the civil law, wherein he found a text
[523] precise, that appeal lies as well where the sentence is of the possession, as where it is of the interest and right; and thereupon granted an appeal.

19. Per Holt Ch. J. an obligation taken in the Admiralty to appear and sue there, is suable in that Court, for it is a *stipulation in nature of bail at common law*; but where there were 13 part-owners of a ship, and one of them refused to let her go to sea, whereupon a stipulation was taken for the share of the party refusing, and afterwards the ship went her voyage, and this stipulation being put in suit in the Court, a prohibition was granted, because the building the ship and the charter-party were at land. 3 Salk. 23 Pasch. 1 W. 3. King v. Perry.

20. The defendant gave bail upon the stipulation in the nature of a recognizance, by which he bound himself and his heirs to abide the judgment of the Court of Admiralty, but died before the sentence, and yet the Court proceeded against the bail. It was insisted among other things for a prohibition, that if the defendant had been in gaol, and died within the walls of the prison, the suit must have abated, and there was no reason why, by the defendant's being in custody of his bail, the suit should be in a better condition; and that whereas the security given was only, that the defendant should abide their judgment, and the Admiralty now have extended it to the defendant's executor. On the other side it was said, that bail in the Admiralty are sued as principals, and that this is the course of the Court, because the plaintiff and defendant being seafaring-men, are subject to more casualties than others. The case was adjourned and compounded. 1 Salk. 33. Pasch. 13 W. 3. B. R. Betts v. Hancock.

21. You cannot appeal in the Court of Admiralty before definitive sentence for a gravamen, as you may in the Ecclesiastical Court. 2 Lord Raym. Rep. 1248. Pasch. 5 Ann. Brown v. Benn & al.

22. The Court of Admiralty granted process against the freight of a ship, in nature of a foreign attachment, for non-appearance; this is wrong, and a prohibition was granted, though

though there was no libel; but the Court of Admiralty may proceed against the ship for non-appearance, though not against the freight. Mich. 8 Ann. B. R. *Bricket & al. v. Pearse.*

(E) [Court of Admiralty.]

Of what Things, in respect of the Place where it arises, they may hold Plea.

{1. BROOK Judgment, 123. A judgment in the Court of Admiralty *De re facta super terram* is void, & coram non iudice.] S. P. resolved by the two Ch. Justices and Ch.

Baron. 13 Rep. 51. Thin: 7 Jac. Case of the Admiralty.

{2. They cannot hold plea upon a bill, or other thing done beyond sea upon the land, because the statute is, that he shall hold plea of things done only upon the sea. Mich. 14. B. R. between *Coulston and Baptist Metaxa* resolved, where the bill was made *apud Zante*, which is in Italy. Mich. 7 Ja. B. * *Leigh's Case*, per Curiam. Hill. 7 Ja. B. between *Hickman and Skinner* adjudged. Hill. 9 Jac. B. per Curiam, between *Davison and Burnaby*. Hobart's Reports; Case 268, 269.] * Ow. 122, 123. Leigh v. Burleigh and Craddock; the Case was, [524] that B. was master of a ship, and gave money

to C. to buy sailors' cloaths for him; and C. bought such cloaths for B. of L. in St. Catherine's parish, near the Tower in London, whereby L. delivered the cloaths to B. in his ship then in the Thames, adjoining to St. Catherine's, and the money not being paid, L. sued B. in the Admiralty Court, and a prohibition was awarded, because the contract was made upon the land, & *infra corpus comitatus*, and therefore the admiral can have no jurisdiction; for the Statute of 13 & 15 R. 2. and 1 H. 4. cap. 11. are, that the admiral shall not have consueude but only of things done *super altum mare*, and cites 5 Rep. 107. and so it was resolved by the justices. — a Brownl. 37. Cradock's Case, S. C. and a prohibition granted accordingly, and for the same reason.

{3. [And therefore] they cannot hold plea of a suit by the King of Spain, for cutting down of brasil wood in Brasilia, because it is upon the land. Hill. 12 Jac. B. R. between the *King of Spain and Pountet* resolved, and a prohibition granted, and it was after tried at common law in a trover and conversion.] * Bullt. 323. D'Acuna v. Pountet, S.C. and a prohibition granted by the opinion of the whole Court. —

Roll. Rep. 133. pl. 10. the Spanish Ambassador v. Pountet, S. C. and per Coke Ch. J. and Doderidge, the Ambassador may have action for it in B. R. and afterwards the Ambassador's counsel came into B. R. and said he would surcease his suit in the Admiralty, and bring action here; and the Court, by consent of the parties, ordered the same accordingly, and so no prohibition was granted; and afterwards the King of Spain brought an action against him in B. R.

{4. They cannot hold plea of a thing done upon the land in England. Mich. 7 Jac. B. *Leigh's Case*, per Curiam.] Ow. 122. Leigh v. Burley S. C. and a pro-

hibition was granted. — a Brownl. 37. Cradock's Case S. C. accordingly.

{5. They cannot hold plea of a thing done upon the Thames, because this is within the body of the county. Mich. 7 Jac. B. * *Leigh's Case*, per Curiam, and a prohibition granted * Ow. 122. Leigh v. Burley S. C. according-

ly. — accordingly. Mich. 5 Ja. B. between *Tomkins and Godwin*, per Curiam, and a prohibition granted where the suit was for Cradock's Case, S. C. according-ly, and says

that the Mayor of London has jurisdiction upon the Thames as far as Wapping, and if a murder be committed on the Thames, it shall not be tried by the Admiral. — Le. 106. pl. 144. Pasch. 30 Eliz. B. R. Sir Julius Caesar's Case S. P. — a Roll. Rep. 413. Mich. 21 Jac. B. R. Anon. S. P. — Mo. 89a. pl. 1255. Mich. 16 Jac. B. R. Anon. all the Court agreed that Littlehouse is within the body of the county, and not within the jurisdiction of the admiral. — The admiral has no jurisdiction of things done at Ratcliffe nor upon the Thames; Ibid. Doderidge J. cited 8 E. 2. fi zh. Corone. 399. — He sued in the Admiralty, because the ship called the S. lying upon the Thames at Redriff at anchor, was there broke by the ship called the *Aneas* by the negligence of the officers thereof; and a prohibition was awarded, because the Thames is *infra corpus comitatus*, and not within the jurisdiction of the Admiralty. Mo. 916. pl. 1304. 1 Jac. Dorington's Case.

† a Browal. 13. for slaying the ship for ballast, Trinity-House v. Bowman. S. C.

[6. They cannot hold plea for the taking of certain goods floating super mare, & ejct. super littora maris; for though they may hold plea de flotsam, yet they cannot hold plea of wreck: and this is wreck when it is thrown upon the land. Tr. 5 Ja. B. a prohibition granted accordingly, and a consultation denied.]

A suit was in the Admiralty for taking of goods circa Cape de Vert super altum mare. It was moved for a prohibition because it was in the

[7. They cannot hold plea of a contract made in portu Middleburgh, because this is not upon the sea. Hill. 8 Ja. B. Vanbeg's Case, per Curiam præter Warburton, Coke said, that there is a precedent in 25 H. 6. and 36 H. 6. where there was a ship riding in a port, and a contract was there made, and a suit for it in the Court of Admiralty; and therefore an action was brought at common law, and 13,000l. damages recovered, the Duke of Exeter then being Admiral.]

[525] Port of Genney when they were at anchor there, and every port is within the body of the land and not upon the salt sea; Coke Ch. J. said that peradventure the ports there are not as the havens are with us; and Doderidge said that there is not any port but there are roads, but they are not within the body of the land but are in the sea, and they might be at anchor in the sea, and therefore a prohibition was denied; but Coke said, that if this had been within the body of the land, the admiral ought not to hold plea of it. Roll. Rep. 250. pl. 18. Mich. 13 Jac. B. R. Willets v. Newport.

* Fol. 23a. [8. If pirates take goods upon the sea from a subject of Spain, and bring them within a port in Ireland, and there sell them to J. S. no suit for these goods can be against J. S. in the Court of Admiralty; for that J. S. came to them by purchase within the body of the county. Mich. 13 (*) Jac. B. between Don Diego the Ambassador, and Sir Richard Bingley, resolved, and a prohibition granted; for the owner of the goods may have an action of trover for the goods at common law.]

See (C.) pl. 4. S. C. and the notes there.

[9. If a subject of the King of Spain commits certain offences in Spain, for which his goods are confiscated, and after comes into England, and brings with him some of the goods, and sells them to J. S. a subject of this realm, and after the Ambassador of Spain sues in the Admiralty Court upon this matter, and there attaches the goods in the hands of J. S. a prohibition lies; for the property

See (B.) pl. 6. and the notes there.

perty of the goods shall not be questioned in any court, but at common law. Hobart's Reports, Case 267. Don Alphonso and Cornero.]

[10. If a *contract or obligation be made upon the sea*, yet if it be *not for a marine cause*, the suit upon this contract or obligation shall be at common law, and not in the Admiralty Court: for if a man makes an obligation for the security of a debt growing before upon the land, or if he make a promise to pay it, this cannot be sued in the Court of Admiralty, but at common law. Hobart's Reports, 17. Bridgman's Case.]

Hob. 12. pl. 23. S. P. by Hobart Ch. J. in Bridgman's Case. — Roll Rep. 133. pl. 10. S. P. cited to have been ruled according-

ly, in C. B. Pasch. 13 Jac. and the Court was of the same opinion.

[11. If a *contract be made upon the sea for the bringing over certain sugars, and after this agreement is put in writing upon the land*, and after the *sugars in bringing over are spoiled upon the sea*, yet the suit for this does not lie in the Admiralty Court, because the putting the agreement in writing upon the land, changes the jurisdiction as to this; and then when the contract is upon the land, though the breach be upon the sea, yet the common law shall have the jurisdiction, and not the Admiralty Court. Hobart's Reports, between Palmer and Pope, Case 268.]

Hob. 79. pl. 104 and Ibid. 212. pl. 270. S. C. & S. P. — See (A. 2) pl. 3. S. C. and the notes there. — (B.) pl. 1. S. C. & S. P. — If

part of the jurisdiction, matter be done upon the sea and part in a county, the common law shall have all the jurisdiction. 12 Rep. 79. Hill. 8 Jac. by the reporter.

[12. If a *contract be made upon the sea*, and the *cause of the suit maritime*, and a *suit is had upon this in the Admiralty Court*, it seems it is sufficient to alledge it to be made within the jurisdiction of the Court, without saying it was made *super altum mare*; for this may be alledged of the other part to have a prohibition, if it was not made *super altum mare*. Contra Hobart's Reports, Case 269.]

Hob. 213. pl. 270. Mich. 9 Jac. Hobart Ch. J. says, note that every libel in the Admiralty doth and

must lay the cause of suit *super altum mare*, which argues that this is a necessary point; for the jurisdiction there groweth not from the cause of tithes and testaments in the Spiritual Court; but from the place. And therefore he was of opinion, that if a contract were made in truth at sea, and a suit upon that in the Admiral's Court, and there the contract is laid generally, without saying *super altum mare* the prohibition will lie; for the libel must warrant the suit in itself though you may on the contrary part surmise, that the contract was made at land, against the libel that lays it on the sea. And he held it also not sufficient for the libel not to lay it *infra jur. mar.* generally, but it must be so laid as it may appear to the King's Court, to be so indeed.

[13. If a man *contracts with me in London, in consideration of* * *to transport certain commodities into Turkey*, if he does not perform it, I cannot sue him in the Court of Admiralty, because the contract was here, and nothing done upon the sea. P. 1 Ja. in * Banning's Case so held + 1 R. 3. 4.]

* It must be tried in London. See tit Trial (B) pl. 1. S. C. + Fitzh,

Trial pl. 29. cites S. C.

[14. If the *owner of the ship sends it to the Indies to merchandise*, and upon the high seas the *mariners and the rest in the* R r 2

Roll. Rep. 285. pl. 1. S. C. a pro- ship

hibition was granted; for though the admiral had a *gravi de bonis piratarum*, yet that must be intended of the proper goods of the pirates, and not those which the pirates stole

from other men; for those are not to be granted, because the owners ought to have them again; but if the admiral was entitled to such goods, yet in this case he ought to sue in the Admiralty; because the sails and tackling were taken *infra corpus comitatus*, viz. upon the Thames, and here the ship is not forfeited for the piracy of those that were in it; per Doderidge J. quod Coke Ch. J. concessit. — 3 Ballst. 147, 148. Mich. 13 Jac. *Prinfton v. the Admiralty Court*, S. P. and seems to be S. C. and ruled accordingly, and Coke Ch. J. said that so was the opinion of the Court when he was Attorney General. — Jenk. 325. pl. 40. *Primiflaus's Case*.

15. If a contract be made in London for things lying upon the sea coasts, and there is a suit for this in the Court of Admiralty, a prohibition lies. H. 7 Ja. B. adjudged between Sarah Selden and others.]

Fol. 533

a Roll. Rep. 486. *Slany v. Maldonado*. S. C. — 4 Inst. 135. cap. 22. S. P. in the answer to the 4th objection. And. Ibid.

138, 139. S. P. cites Mich. 31 H. 6. Rot. 215. *Hore v. Unton*. And. Ibid. 141, 142. cites Pasch. 28 Eliz. B. R. *Constantine v. Gynne*, S. P. — Mo. 450. pl. 612. Pasch. 38 Eliz. C. B. *Turner v. Oldfield*, a prohibition to the Admiralty, because they libelled in the Admiral Court upon a charter-party to have the 3d part of goods taken upon the sea by letters of mart, whereas the matter was triable upon the land, and not in the Admiralty by reason of the indenture of charter-party; et adjornatur. Quære.

If *flotam* comes to land and is taken there by him who has no title, the action shall be

brought at the common law and no proceedings shall be thereon in the Court of Admiralty; for [527] there is no need of condemnation thereof as there is of prizes; per tot. Cur. 2 Mod. 294. Hill. 29 & 30 Car. 2. C. B. *The Lady Windham's Case*. — [The original is, shall (not) be brought, which seems misprinted.]

4 Inst. 140. Cites Temps E. 1. avow.

[17. If a man takes a mast floating upon the sea, and draws it upon the shore, where J. S. takes it, claiming there Admiralty jurisdiction, an action does not lie against him for this in the Court of Admiralty, but at common law, because the tort was done upon the land. Mich. 10 Ja. B. *Mayor of Harwich's Case*, per Curiam.]

[18. But if a man takes a thing upon the sea, and brings it to land, and carries it away, the suit for this shall be in the Admiralty

Admiralty Court, for this is a *continued act*. Mich. 10 Jac. B. ry 198. Mayor of *Harwich's Case*, per Curiam.] S. P. and says, that when a

taking is partly on the sea and partly in a river, the common law shall have jurisdiction.

[19. If a *shipwright sues in the Admiralty Court, for the making a ship for navigation upon the sea*, a prohibition does not lie. P. 9 Car. B. R. between *Taske and Gale*, per Curiam agreed.] so if for the amending, saving, or necessary victualing of a ship,

if against the ship itself, and not against the party by name, but only against such as for his interest makes himself a party 2 Danv. 270. cites Cro. C. 296. [and the table of Cro. Car. tit. Admiralty, refers to fol. 296, 297. but I cannot find any thing relating to the Admiralty there, or thereabouts, and the only place it refers to besides, is fol. 603. but the S. P. is not there neither. So quære where the point it to be found.]

[20. But if a suit be in the Admiralty Court *for making a lighter for the carriage of mud, or the like, within the body of the county upon the Thames, and not for navigation*, a prohibition lies. P. 9 Car. B. R. between *Taske and Gale*, per Curiam agreed.]

[21. If the suit be in the Admiralty Court *upon a charter-party for demurrage, or for * mariner's wages, but not for any penalty within the charter, but only for the wages contracted for, or for demurrage, according to the contract*, no prohibition lies. P. 9 Car. B. R. said per Curiam to be so lately resolved by all the Judges of England.] * 4 Inst. 141. cap. 22. ckes 48. E. 3. 3. that if a mariner makes a covenant to serve in a ship upon

the sea, yet if the wages be not paid, it shall be sued for in this Court by the common law, and not by the law of mariners. Raym. 3. Hill. 12 Car. 2. B. R. in the Case of Woodward v. Bonithan, Arg. insisted, that of mariners wages the Admiralty shall have the cognisance of it; and so it was agreed by all the justices, Hill. 8 Car. 1. 1 Cro. and of this opinion was Mallet J. But Foster Ch. J. and Twisden J. held a prohibition would well lie, for the Statute of 15 R. 2. cap. 3. was made at the great complaint of the Commons, and should therefore be construed most beneficially for the good of the subject; and when the ordinances and orders in the time of the late troubles were made, the constant and generally received opinions were, that for mariners wages &c. the parties could not sue in the Admiralty, and for that reason pretended orders were made on 12 April, 1648. cap. 11. and another 23 April, 1649. cap. 21. to enable the Admiralty to hold plea of such things; and as to that Case of 8 Car. 1. they said, that that had not only been denied by several other judges as well as by themselves at this time, but had been renounced even by several of those judges who are said to have subscribed to it, for which reason a prohibition was granted.

[22. If A. a merchant in London, writes to his factor in France to buy wines for him there, and to send them to him to London, and to charge him for the payment thereof with bills of exchange to be paid in London, and the factor does accordingly, and after A. hath received the wines in London, and accepted the bills in London, he dies before the day of payment of the money by the bills, and after the bills for non-payment are protested in London, and after sent into France, where the factor is compelled to pay them, in this case no suit can be upon this matter against the executor of A. in the Court of Admiralty, for that this contract had its original in London, scilicet, the writing the letter, and the acceptance of the goods and bills of exchange in London makes the contract compleat, and therefore this contract is

[528] to be tried at common law. Hill. 14 Car. B. R. between *Haywood and Anne Davyes*, a prohibition granted per Curiam, and upon complaint thereof to the king by some of the Admiralty Court, a meeting and conference, and debate thereof was at Serjeant's Inn, between *Sir Henry Martyn* and the Judges of the King's Bench, where counsel was held for Anne Davyes, and Dr. Zouch for the other side; and the Court inclined clearly that the prohibition lies, but ordered, that the prohibition should not issue, if in the Admiralty they would deliver Anne Davyes upon bail for her appearance the next term; but if they would not deliver her, then the prohibition should issue.]

23. The Court of Admiralty hath no cognizance of *things done beyond sea*, and this appears plainly by the Statute of 13 R. 2. cap. 5. the words of which statute are, that the admirals and their deputies shall not meddle from henceforth of any thing done within the realm, but only of a thing done upon the sea, cites 19 H. 6. fol. 7. for things transitory done beyond the seas, are either triable in the King's Courts, or the party grieved may have his remedy before the Justices where the fact was done beyond seas. Resolved in C. B. 12 Rep. 103, 104. Hill. 2 Jac. Tomlinson v. Philips.

Ow. 122.
Leigh v.
Burley,
S. C. and
the libel
was for
goods
bought of
a salesman
at St. Katherine's
near the
tower, who
delivered them on board the defendant's ship there, but a prohibition was granted, because this contract was made on land, & infra corpus comitatus, and therefore the admiral has no jurisdiction. — S. C. cited 2 Show. 338. in pl. 347.

24. C. bought divers things within the body of the county, which concerned the furnishing of a ship, as cordage, powder, and shot, and the party of whom they were bought sued C. for the money in the Admiralty Court, and prohibition was granted; for the Statute of R. 2. is, that the admiral shall not meddle with things done within the realm, but only of things done upon the sea, and that no contract made upon the land shall be held there. 2 Brownl. 37. Mich. 7 Jac. Cradock's Case.

25. Libel in the Admiralty upon a contract made at *Marseilles in France*; Fleming Ch. J. denied to grant a prohibition; for though the Admiralty Court has nothing to do with this matter, yet since this Court cannot hold plea of it (the contract being made in France), no prohibition lies. But *Yelverton and Williams J.* e contra, that the admiral has no jurisdiction, and that the contract may be laid to be made at *Marseilles, in Kent, or Norfolk, or any other county*, and so triable here. 2 Brownl. 11. Mich. 8 Jac. B. R. Anon.

26. The plaintiff was in execution upon a judgment obtained in the Admiralty against him upon a contract made on land in *New England*, and this appearing upon a bill exhibited against the now defendant, upon the Statute 2 H. 4. cap. 11. for suing in the Admiralty upon a contract made at land, which the Court held to be coram non iudice, and he was discharged. Cro. Car. 603. pl. 8. Hill. 16 Car. B. R. Ball v. Trelawny.

27. Wild moved for a *prohibition* to the Court of Admiralty to stay a trial there in a *trover and conversion*, in which they proceeded upon a pretence that the goods were taken upon the high sea, and that by the late act they have exclusive power in all such cases which is not so. Glyn Ch. J. said, it was resolved in *CREEMER AND COKELYE'S CASE*, and so adjudged that they have no such power; therefore take a *prohibition nisi &c.* Sty. 470. Mich. 1655. *Lepool v. Tryan*.

28. A Dutch ship being wrecked by tempest in a creek of the sea *infra corpus comitatus* of Dorset. The sailors, upon pretence that the goods in the ship were *bona peritura*, procured a commission of sale out of the Admiralty Court; whereupon the true owners, to prevent such sale, brought a *superfedeas*; and upon producing the libel to the Court, a *prohibition* was prayed and granted, because the cause of action did arise *infra corpus comitatus*, and so the Admiralty cannot hold plea thereof, and the sale of these goods is good as they are *bona peritura*. 2 Sid. 81 Trin. 1658. B. R. *Culliver v. Brand*. [529]

30. In a *prohibition* the case was, the defendant was master of a ship, of which S. the plaintiff was owner, and the ship was taken by pirates upon the sea, and to redeem himself and the ship he contracted with the pirates to pay 50l. and pawned his person for it. The pirate carried him to the Isle of Scilly, and there he borrowed the 50l. for which he gave bond, and paid the pirate; and being discharged, he libelled in the Admiralty for the 50l. At his return he sued in the Admiralty for the 50l. and had a sentence for it. The owner moved for a *prohibition*, but it was denied, because the original cause arose on the sea, and all which followed was but accessory and consequential to that cause, and therefore well determinable in the Court of Admiralty. Hard. 183. Pasch. 13 Car. 2. in Scacc. *Spark v. Stafford*.

31. Suit in the Admiralty for a ship, as *floatsam*, left near an harbour in Norfolk; it was agreed that *floatsam* should be tried in the Admiralty, but because the suggestion was, that the dereliction was *infra corpus comitatus*, a *prohibition* was granted; for they may take issue upon the suggestion; and if it be found to be out of the county a consultation shall go. Sid. 178. pl. 9. Hill. 15 & 16 Car. 2. B. R. *The Lord Admiral v. Linsted*. Keb. 657.
pl. 39. the
Duke of
York v.
Linstred,
S. C. the
Court
agreed, that
floatsam
properly
belongs to
the admiral,

and that they may try it whether it be so or no; but this suggestion being of a dereliction within the body of the county, it ought to be tried by jury, and the decree in the Admiralty will be allowed a good plea in *trover* for it; and by Windham, *floatsam* is that which is totally derelict, and not that which is avoided in the sea for fear of danger, to which the owner has still an eye, and only goes out to pray for help, which Twifden agreed, but this is triable by the admiral; and the claim of property by the party must be in the Admiralty within the year and day. Keeling conceived, that *floatsam* within the county is of the admiral's jurisdiction divided with the common law, but here an owner appears within the record within the year and day, and therefore they ought here to demur or take issue on the suggestion. No *prohibition* was awarded but only as to the fact in *corpus comitatus*.

32. A libel was against a ship and the master, and also against the former owner, and the now owner, for *saik and other*

other necessaries found for the ship in 1681. The plaintiff (the now owner) for a prohibition suggests the Statute R. 2. and that the materials, work done, and contract made, and every thing contained in the libel, were done at land, and not super altum mare, and that after the time specified in the libel, the plaintiff bought the ship, cum omni apparatus, for a considerable sum of money, at land. It was argued, that though the sails were for the ship, and done about it, yet they were not absolutely necessary, nor was it in a voyage, so that the libel is not for any supposed hypothecation by the master in a time and case of urgent necessity; besides, the buying was upon land with all her furniture, and the defendant has his action at law upon his contract, and for his wares sold; and a prohibition was granted as to the ship and the present owner &c. 2 Show. 338. pl. 347. Hill. 35 & 36 Car. 2. B. R. *Hoare v. Clewment*.

[530] 33. The master had hypothecated a ship for necessaries, being upon the sea in stress of weather. It was suggested for a prohibition, that the agreement was made, and the money lent, upon the land, viz. in the port of London. But by Holt Ch. J. this must necessarily be so; for if a man be in distress upon the sea, and compelled to go into port, he must receive the money there or not at all; and if the ship be impaired by tempest, so that he is forced to borrow money to prevent her being lost, and pledges his ship for security, *since the cause of the pledging arises upon the sea, the suit may well be in the Admiralty Court*; but because there was a precedent where a prohibition was granted, the Court granted one now, and ordered the plaintiff to declare upon it; for the law seemed clear to them as aforesaid. Lord Raym. Rep. 152. Hill. 8 & 9 W. 3. *Benzen v. Jeffries*.

(E. 2) Punishment of suing in the Admiralty in Cases out of their Jurisdiction.

An action was brought upon this statute for suing in the admiralty upon an hypothecation, and it was held to be out of the statute in the time of my Ld. Hales cited by Holt Ch. J. Ld. Raym. Rep. 152. Hill. 8 & 9 W. 3. in Case of Benzen v. Jeffries.

1. 2 H. 4. *If any person shall be prosecuted in the Admiral's cap. 11. Court, contrary to the 13 R. 2. cap. 5. he shall have an action of the case against the prosecutor, and recover double damages, and the prosecutor shall forfeit 10l. to the king.*

2. *In writ on the case founded on the Statute of 2 R. 2. or 15 R. 2. or 2 H. 4. against such as hold pleas before the admiral of contracts made upon the land &c. the plaintiff ought to say in his writ, contra formam statuti prædicti. otherwise it is not good, and it ought to be brought in the county where the plea was held before the admiral, and not in the county where the contract was supposed to be made. Bendl. 57. pl. 92 Pasch. & Trin. 4 & 5 P. & M. Mathender's Case,*

3. *P. and R. bought a ship at land of B. and sued B. upon the contract in the Admiralty Court, and for their suing in the Admiralty Court, B. brought an action against P. only, and held good.* D. 159. b. pl. 37. Pasch. 4 & 5. P. & M. Bylota v. Pointel.

Bondl. 64.
pl. 111.
S. C. bot
S. P. does
not appear.

4. *A. and B. sued C. and D. in the Admiralty for a cause arising at land. A. died. The King and C. one of the persons grieved, brought an action against B. one of the prosecutors, without shewing the death of A. The judgment was, that the party grieved recuperet damnum & quod defendens poenam 10l. erga regem per statut. prædict. incurrat & capiatur & quod dominus rex recuperet versus defendent. 10l. &c. & defend. capiatur.* D. 159. b. pl. 38. cites 1 Eliz. Swanton v. Willet.

S. C. cited
Arg. 4 Mod.
180. 181.
in Case of
Sands v.
Child.

5. An action on the case was brought for suing in the Admiralty Court, in a cause where they had no jurisdiction, (viz.) for a thing done on the land, and not on the high sea, Brownl. 4 Mich. 11 Jac. Row v. Alport.

6. Case &c. on the Statute 2 H. 4. cap. 11. for suing in the Admiralty for a matter done at land, wherein the plaintiff set forth, that he was attached in that Court, *pro defalcatione of his oar infra fluxum & refluxum maris, when in truth, if any thing was done, it was done in such a place, which was infra corpus comitatus, and that he was attached to appear before one Crumpton, Deputy-president or Judge of the Court &c.* After a verdict for the plaintiff, and a writ of error brought; it was assigned for error, that the declaration was ill, because the plaintiff had set forth, that *if any thing was done, it was infra corpus comitatus &c.* which is *not a direct affirmation*, that it was done *infra corpus comitatus*; but per Haughton if nothing was done at land, yet a suit in the Admiralty, supposing a thing to be done at sea, where in truth no such thing was done, is punishable by this statute; quod fuit concessum per Cur. Then it was objected that the plaintiff set forth that he was attached to appear before one Crumpton, Lieutenant or President to the Admiral Court, and did not alledge that it was before the Admiral or his Deputy, as the statute directs. But the Court held it well enough; for it is alledged that he was attached to appear coram Crumpton deputat. præfidente seu ejus locum tenente, and after says, that he comparuit coram Crumpton deputat. Præfidente seu Judice of the Court. Roll. Rep. 203. pl. 5. & 410. pl. 51. Trin. 14 Jac. B. R. Fleming v. Yate.

2 Bull. seq.
S. C. ad-
judged in
B. R. and
so a judg-
ment in
C. B. re-
versed.

[531]

7. An action doth lie by the statute against the Court of Admiralty for holding a plea of a matter which is not within their jurisdiction, (Mich. 22. Car. 1.) B. R. and justly; for every jurisdiction ought to be kept within its own bounds; and if any one be injured by transgressing therein, the common law will relieve the party injured thereby, and cause satisfaction to be made for this injury. L. P. R. 17.

8, Plaintiff

Skinn. 361. pl. 3. S. C. and Holt Ch. J. in delivering the opinion of the Court, said that there being not any difficulty in the case they would not argue it, but were all of opinion that the judgment ought to be affirmed; for though the suit, in the Admiralty was not against the person, yet being there against his goods according to the course of proceedings there, this is a suit in the Admiralty within the statute. And though the defendant is not party in Court, yet if he be the person that moves the suit and is the cause

of such charge and trouble, an action lies against him.——4 Mod. 179. S. C. and judgment affirmed.——3 Lev. 351. S. C. and judgment affirmed per tot. Cur.——Comb. 215. S. C. and judgment affirmed.——Carth. 594. S. C. and judgment affirmed.

8. Plaintiff S. declared, setting forth the 13 R. 2. 15 R. 2. and 2 H. 4. c. 11. which gives the party grieved double damages, and 10l. to the king; and that he was owner of a ship lying in the Thames infra corpus com. laden with divers goods, wherein he had a 5th part to his own share; that the ship was ready to sail, and that the defendant caused a proceeding to be made in the Admiralty against the ship, and the ship to be arrested and staid quousque he gave security not to go to the Mederas, or East Indies, whereby he was staid 3 months, and lost his voyage ad dampnum 3000l. On non culp. jury found that the East India Company, by charter, had the sole trade to the East Indies and Mederas, and that the plaintiff was going thither; and Sir J. C. one of the defendants, was governor of the company, and procured an order of council to the king's advocate general to proceed in this manner &c. and that the defendants sued this process out of the Court of Admiralty; and if pro quer. jury find 1500l. damage, and 51l. costs, which were doubled in the judgment according to the statute. Judgment for the plaintiff in C. B. and now in error brought it was agreed that though here was but one act, and but one offence, yet every several person injured might have an action and recover damages, and upon every conviction the defendant would forfeit 10l. to the king: Though there be a process only and no suit, nor no plaintiff and defendant, yet this is a prosecution within the meaning of the statute, for it is an usual proceeding there, and of the same mischief; that C. was a prosecutor within the statute though no suit was in his name, because he promoted and maintained it; and if he did it of his own head, then it is properly his own action; if as agent to the company, and by their command, then that command being to do an unlawful act was void; but they held a mere attorney would not be a prosecutor within the statute. Judgment affirmed. 1 Salk. 31, 32. pl. 2. Pasch. 5 W. & M. in B. R. Sir Josiah Child & al. v. Sands.

532 1-(E. 3) Prohibition. In what Cases. And at what Time.

1. SIR J. C. Judge of the Admiralty, exhibited a bill in that Court against the defendant N. who was an officer of the lord mayor, for measuring coals at a wharf in the parish of St. Dunstan's in the East, upon the river Thames; Wray and Gawdy Justices said, that if it be extortion there is no remedy for it in the Admiralty, but in the King's Court; and per Gawdy it shall be redressed here by a quo warranto. Le. 106. pl. 144. Pasch. 30 Eliz. B. R. Sir Julius Cæsar's Case.

2. In

2. In a case where *A. and B. were equally entitled by the civil law to a prize ship*, *A. as the actual captor*, and *B. as being present*, and *B. sued in the Admiralty for his moiety*, *A. for a prohibition* / *remised that after their arrival in England they agreed inter se that A. should have 4 parts of the said ship and goods, and that B. should have the other 5 parts [the other 5th part]* and *A. said that he pleaded this matter in the Admiralty, and they would not allow the plea*, whereupon a prohibition was granted; but it was afterwards moved by *B.* that the Court of Admiralty would allow the plea and try it there, whereupon a conditional consultation was granted, *ita quod the Court allow that plea and try it there*; and it was said, that if the Court should not allow the plea it would be a contempt of this Court, and a prohibition should be granted. 2 Le. 182. pl. 224. 32 Eliz. C. B. Somers v. Buckley

3. A suit was in the Admiralty Court for *setting a ship in a wharf to the damage of the plaintiff; so that none could come to his wharf, which is said within the bill to be within the ward of St. Mary-Hill*; and a prohibition was granted, upon a suggestion, that it was good for the ordering of ships. A consultation was granted, but afterwards upon good advice and opening the matter, a superedeas to the consultation was granted & quod prohibitio stet; for the wrong and fact is said to be within a county and ward; and for that it does not belong to the admiral; and for civil contracts or trespass done upon the river Thames, or any other river, that is proper to the common law, triable in that county, which is next to the bank, and that side of the river where the fact was done, but in criminal matters upon any river, that is given to the Admiral by the Statute 28 H. 8. cap. 15. Noy. 148. Goodwin v. Tomkins.

4. *The master of an Hamborough vessel freighted her at Brazil, and became bound in the custom house there to unload the merchandizes according to the manner there used at St. Michael's, to the intent to satisfy the king's customs. The ship was drove by tempest on the coast of England, so that she could not touch at St. Michael's. The Spanish ambassador supposing the goods were forfeited to the King of Spain for not paying customs, sued in the Admiralty here, and the Court gave sentence, that the King of Spain should have the possession of the goods, but did not determine the interest and right of them. Whereupon the owner sued to the Lord Chancellor for an appeal, which was opposed by the Judge of the Admiralty, and it was argued by civilians on both sides, but Lord Chancellor fetched a civil law book out of his closet, in which was a text precise that an appeal lies as well where the sentence is of the possession, as where it is upon the interest and right. Mo. 814. pl. 1102. Mich. 8 Jac. Spanish Ambassador v. Plage.*

5. In all cases where the defendant admits the jurisdiction of the Admiral Court by pleading there, a prohibition shall not be granted, unless it appears by the libel that the act was done
out

out of their jurisdiction; and that though sentence was given, yet if that appears within the libel a prohibition shall be granted; agreed. 2 Brownl. 30. Mich. 9 Jac. C. B. in Case of Jennings v. Audley.

6. A suit was in the Admiralty on a charter-party made beyond sea on the land; a prohibition was granted, because not made on the main sea. But if the defendant admits the jurisdiction of the Court, and suffers sentence, then B. R. will not on a bare surmise grant a prohibition after admittance of the party himself, unless it appears in the libel that the act was not made within the jurisdiction of the sea; and the Court agreed to this difference. 2 Brownl. 34 Mich. 1611. 9 Jac. C. B. obiter.

So where a contract was on land with several seamen to bring a ship from a port of England to London for a certain sum to them to be paid, a prohibition

7. A libel was brought by several mariners against J. the master of a ship, and judgment being given against J. he suggested for a prohibition that the contract was made at L. in England, but a prohibition was denied, because he had not sued his prohibition in due time, viz. before a judgment in the Admiral Court, but if they sue here they must bring their actions several, because they cannot join here in an action, and therefore it is good discretion in the Court to deny a prohibition. Win. 8 Pasch. 19 Jac. Jones's Case.

was denied; for this must be taken as mariner's wages, and therefore they have jurisdiction; besides the party comes after sentence, and therefore it is in the Court's discretion to grant a prohibition or not. Vent. 243. Mich. 31 Car. 2. B. R. Anon.—A prohibition shall not go to the Admiralty to stay a suit there for mariners wages, though the contract were upon the land. For, 1st, It is more convenient for them to sue here, because they may all join. And according to their law, if the ship perish by the mariners default, they are to lose their wages, therefore in this special case the suit shall be suffered to proceed there. Vent. 146. Trin. 23 Car. 2. B. R. Anon.—3 Mod. 244. Arg. cites Win. 8. but says, the reason of denying prohibitions for mariners wages seems to be because they proceed in the Admiralty not upon any contract at land, but upon the merits of the service at sea and allow or deduct the wages according to the good or bad performance of the services in the voyage. And Ibid. 245. S. P. admitted by the counsel of the other side; but says, that the principal reason of suing in the Admiralty for mariners wages is, because the ship is liable as well as the master who may be poor and not able to pay the seamen. Mich. 4 Jac. 2. B. R. Anon.

8. A Dunkirk took a Frenchman's ship at sea, and before it was brought infra præsidia of the King of Spain, it was driven by contrary winds to Weymouth in England, and there the ship and goods were sold; the Frenchman libelled in the Admiralty Court pro interesse suo against the vendee, suggesting that the ship &c. was taken by piracy, and not by letters of mart as was pretended, and prayed a prohibition. Bankes Ch. J. and Foster J. conceived that a prohibition should go; but Crawley J. e contra. But all agreed (Reeve J. absente), that if a ship be taken by piracy, or if by letters of mart, and be not brought infra præsidia of that king by whose subject it was taken, it is no lawful prize, and the property not altered, and therefore the sale void. March. 110. pl. 188. Trin. 17 Car. Anon.

9. There was a suit in the Admiralty for the profits of the beaonage of a rock in the sea, near in Cornwall, and upon a motion for a prohibition it was denied, for the profits of beaonage belong to the admiral, and by consequence the suit for

for these profits may be within the Court of the Admiralty, though the beacon itself may be the inheritance of any private person, and impleadable in the King's Courts. Sid. 158. pl. 10. Pasch. 15 Car. 2. B. R. Croffe v. Diggs.

10. *We being at war with Denmark*, one M. a Scotch privateer, took a Danish ship as prize, which was condemned as a prize in Scotland, and afterwards was bought by T. at land, whereupon S. libelled in the Admiralty here against T. and M. and shewed that M. took the ship, and that she was not a Danish but a ship of London, and that she was loaded with his goods. T. moved for a prohibition, because he claiming property which he acquired on the land, the Admiralty had no jurisdiction, especially as this goes in nullity of the proceedings in Scotland, where the Court of Admiralty there has as great jurisdiction as the Admiralty here; but per Cur. since the question is prize or no prize no prohibition shall go. Sid. 320. pl. 12 Hill. 18 & 19 Car. 2. B. R. Thompson v. Smith.

2 Keb. 158. pl. 44. and 176. pl. 66. S. C. the Court held that the defendant here has no [534] property, but by the sale, and the only question will be prize or no prize, and therefore Comb. 444.

they would stay nothing nor award a prohibition. — S. C. cited by Holt Ch. J.

11. *Libel was in the Admiralty against 2 for mariners wages*, and there was sentence and execution against one of them, and he paid the money, and now they both moved for a prohibition upon a suggestion that the contract was made at land; it was denied as to him who had paid the money, because at that rate one may have prohibition seven years after sentence, which is not reasonable, but granted as to the other. Sid. 331. pl. 14. Pasch. 19 Car. 2. B. R. Walker v. Adams.

2 Keb. 200. pl. 38. S. C. the Court held that there was no cause of prohibition after sentence executed, nor nothing that can be prohibited.

hibited. — Ibid. 215. pl. 53. S. C. the Court inclined that no prohibition lay but after the parties agreed. — Ibid. 227. pl. 88. S. C. The parties agreed to stay the suit in the Admiralty, and the defendant here to appear and take a declaration in an assumpsit, for the money received for the seamen's wages.

12. *A ship was taken at sea as prize*, and being brought near the shore was stranded, but the foreigners from whom it was taken libelled in the Admiralty Court, upon suggestion that it was not prize. After several debates the Court held that no prohibition should go, because the taking was the cause of this suit, the which was within the jurisdiction of the Admiralty. Sid. 367. pl. 3. Trin. 20 Car. 2. B. R. Turner & al. v. Smith.

Lev. 243. Turner v. Neale, S. C. but not exactly S. P. — 2 Keb. 360. pl. 4. and 364. pl. 16. Turner v. Neale S. C.

but not exactly S. P.

13. *M. was captain of a private man of war*, in which B. had an interest, and M. took a merchant ship beyond the line, laden with divers merchandizes, B. sued M. in the Court of Admiralty to have an account, M. pleaded there the Statute of 21 Jac. 1. of limitations, the cause of action being of more than 7 years standing before the suit commenced as appeared by the libel. And now M. suggested that the Court of Admiralty would not receive that plea, and therefore prayed a prohibition. And the Court held that the plea ought to have been received for

for that *the said statute was pleadable there*; and if it were not received, that the rejecting it was a good cause to have a prohibition, as likewise if they receive it, and do not give sentence thereupon, as the common law requires. But a prohibition lies not before refusal, because the original matter is examinable there. Hard. 502. pl. 8. Mich. 20 Car. 2. in Scaccario. Berkeley v. Morrice.

14. A prohibition is prayed to the Admiralty in *suit by the master and mariners for wages*, which the Court denied, albeit the mariners were retained by the master, unless it be *by charter-party of freight*, nor has it ever been granted, and the rule for prohibition was discharged. 2 Keb. 779. pl. 6. Trin. 23 Car. 2. B. R. The King v. Pike.

15. An *English ship was taken by a French man of war under colour of a Dutchman, and carried into France and there condemned by their Court of Admiralty as a Dutch prize*; afterwards an *English merchant bought this ship of the Frenchmen, and brought her into England*, where the *right owner brought an action of trover for the ship against the purchaser*; and all this matter being found specially, *the defendant had judgment*, because the ship being legally condemned as Dutch prize, this Court will give credit to the sentence of the Court of Admiralty in France; and take it to be according to right, and will not examine their proceedings; for it would be very inconvenient if one kingdom should by peculiar laws correct the judgments and proceedings of the Courts of another kingdom. This was a case cited by the Court. Carth. 32.

Skin. 59.
Mich. 34.
Car. 2. B. R.
Hughes v.
Cornelius
S. C. says
the ship
was Dutch
[545]
built, and
after made
an English
ship, the
master was
Dutch,
some of
the seamen
English,
and two
Dutch.
The Court
would not
suffer it to
be argued,
but ordered
judgment
to be entered
for the
plaintiff;
for they said
that sentences
in Courts of
Admiralty
ought to bind
generally
according to
jus gentium.
And if the
merchant in
this case had
received wrong
he ought to
apply to the
Admiralty
and council,
this being a
matter of
government,
and that the
king if he
saw cause
would
send to his
ambassador
leiger in
France who
would take
care that
right should
be done, and
that if right
be not done,
then the king
would grant
letters of
marque and
reprisal. — Raym.
473. S. C. adjudged
accordingly. — S. C.
cited Arg. Show.
143. — S. C.
cited Comb. 281.
per Holt Ch. J.

16. If a man is taken on suspicion of piracy, and a bill is preferred against him, and the jury find *ignoramus*; if the Court of Admiralty will not discharge him, the Court of King's Bench will grant a habeas corpus, and if there be good cause, discharge him, or at least take bail for him. But if the Court suspects that the party is guilty, perhaps they may remand him; and therefore in all cases, where the Admiralty legally have an original, or a concurrent jurisdiction, the Courts above will be well informed before they will meddle. Molloy 70. cap. 4. s. 31.

17. No prohibition shall be granted where a *libel is not brought into Court*; per Cur. Comb. 136. Trin. 1 W. & M. in B. R. in Case of Corset v. Husely.

18. *Libel in the Admiralty against the master and ship which lay in the River Thames, for heedlessly running over another ship*; the defendant there moved for a prohibition. The plaintiff informed the Court that the defendant would not appear,

appear, so that he could have no action at law; and thereupon the Court refused to grant a prohibition, unless the defendant would appear and give bail. 2 Salk. 548. pl. 3. Trin. 4 W. & M. in B. R. Wharton v. Pitts.

19. The ship was libelled against in the Admiralty, for that the master being taken by a French privateer, had ransomed the ship for 300 l. and had sued for the payment of it, and was carried prisoner to Dunkirk, and the money was not paid &c. and sentence was given in the Admiralty against the ship; and upon motion for a prohibition it was denied by Holt Ch. J. then alone in Court, because the taking and pledge being upon the high sea, the ship by the law of the Admiralty shall answer for the redemption of the master by his own contract. Ex relatione m^{ri} Place. Lord Raym. Rep. 22. Mich. 6 W. & M. Wilfon v. Bird.

20. One B. by letters of marque &c. from the African Company, took a French ship near Gambay, which he carried into Africa, and the Admiralty there condemned her as prize, afterwards B. sold the ship at land, and applied the money to his own use, and then coming into England was sued in the Admiralty here for an account. After sentence given against him, he appealed, and moved for a prohibition, but denied; for the suit here is but an execution of the first sentence, by which the ship is adjudged the king's prize, and the Admiralty having jurisdiction, their sentence did bind the property, and cannot be gainsaid till reversed by appeal. 1 Salk. 32. pl. 3. Trin. 9 W. 3. B. R. Broom's Case.

Comb. 444.
The King
v. Broom.
S. C. and R.
prayed a
prohibition,
suggesting
that the
ship was
taken super
terram in
partibus
transmarinis;
but it
was denied
for per
Holt Ch. J.

the taking being at sea, that gives the Admiralty a jurisdiction and the subsequent conversion is to be coupled with it. — 5 Mod. 340. S. C. and it was further insisted for a prohibition, that the property being once vested in the king by the condemnation of the ship as prize, there can be no suit in the Admiralty here afterwards; for if after such condemnation the goods are converted, the king must bring an action of trover; and that this is a plain action of trover upon the face of the libel. But it was answered that this ship was taken without any commission or letters of mart, and therefore it is a perquisite to the Admiralty, and B. is responsible to [536] the king for ship and goods. — 12 Mod. 134. S. C. and held that by law of the Admiralty the property of a ship taken without letters of mart vests in the king upon the taking, and this upon the high sea, and therefore that which was taken was but in trust for the king and he, who took it, is but accountable to him; and for the account and breach of this trust the suit in the Admiralty is very proper. Now if the party, that took this ship, brought it to land and there sold it and converted it to his own use, this makes him a wrong-doer ab initio, and rule for a prohibition was discharged. — Carth. 398, 399. S. C. and prohibition denied, because the Admiralty had jurisdiction of the original cause which was the capture, on which the king's title immediately accrued, and the embezzlement was immediately upon the capture, and so all was but one continued act; and this ad libel was but a continuance of the first suit and a charge grounded on the first sentence by way of execution thereof.

21. A libel in the Admiralty was for the caption of a ship generally without shewing that it was upon the high sea, but the subsequent proceedings did shew it. After sentence in the Admiralty a prohibition was moved for, but the Court was divided. Comb. 462. Mich. 9 W. 3. B. R. Tremoulin v. Sands.

Carth. 423.
Thermolin
v. Sands
S. C. accordingly.
—
Ld. Raym.
Rep. 271.
Shermoulin
v. Sands

S. C. accordingly, and so no prohibition was granted. — 12 Mod. 143. Tremoulin v. Sands
S. C. the Court divided and so rule for prohibition was discharged.

22. B. R. will not prohibit *all the mariners of any one of them to sue in the Admiralty for their wages*. For per Cur. there is no difference where one libels, and where many do. For the reason why B. R. permits mariners to libel there for their wages, is not only because they are privileged to join in suit there, whereas they ought to sever at common law, because the contracts are several; but also by the maritime law, mariners have security in the ship for their wages, and it is a kind of implied hypothecation to them; and therefore B. R. allows mariners to sue in the Admiralty for their wages, *because they have the ship for their security*. Lord Raym. Rep. 398. Mich. 10 W. 3. in Case of Hook v. Moreton.

S. C. cited
Id. Raym.
Rep. 632.

23. On a question whether a *mate of a ship* might libel in the Admiralty for mariners wages, it seemed to the Court that a mate is but a mariner and therefore might libel there: Lord Raym. Rep. 397, 398. Mich. 10 W. 3. Hook v. Moreton.

24. *Prohibition nisi causa* was granted to Court of Admiralty for libelling there for *seamens wages*, it appearing on the libel that the *service* was all *on the river Thames*. 12 Mod. 230. Mich. 10 W. 3. Bidolph and Bruce.

12 Mod.
246. S. C.
and per Cur.
the Court of
Admiralty may
rescind her
out of their
jurisdiction,

25. If a *ship* be *arrested by a protest* out of the Court of Admiralty for a matter arising within their jurisdiction, though she be *rescued at land*, the consuance of the rescue belongs to the Admiralty, otherwise not; per Holt Ch. J. Lord Raym. Rep. 446. Pasch. 11 W. 3. Rigden v. Hodges.

and no prohibition lies

S. C. cited
by Holt Ch.
J. 12 Mod.
406. by
name of
Crosby v.
Lofmell.—
S. C. cited
by Holt Ch.
J. Lord
Raym. Rep.
272. as re-
solved a
W. & M.
in B. R.
Coffard v.
Lewistie.

26. Though a master of a ship cannot sue in the Admiralty for his wages, yet possibly if the *master dies in the voyage* and *another man takes upon him the charge of the ship upon the sea*, such case might be different, as in the Case of *GROSVICH v. LOUTHSLEY, where it was held lately in this Court, that if a ship was *hypothecated* and money borrowed upon her at Amsterdam *upon the voyage*, he that lent the money may sue in the Admiralty for it, and this Court granted a consultation. But in another case, where money was borrowed upon the ship *before the voyage* B. R. granted a prohibition, and the parties acquiesced under it. Per Holt Ch. J. Ld. Raym. Rep. 577, 578. Trin. 12 W. 3. in Case of Clay v. Snelgrave.

S. C. cited a Lord Raym. Rep. 805. Arg. & Ibid. per Cur. 806. Mich. 1 Ann. in Case of Justin v. Ballam.—S. C. cited Arg. and by Holt Ch. J. 2. Ld. Raym. Rep. 989. Trin. 2 Ann. by the name of Coffart v. Lawdley.—6 Mod. 79. S. C. cited by Holt Ch. J. as the Case of Corstwick v. Lowseley. 1 W. & M. argued and resolved by all the judges. And Powell J. added, that though in that case the libel laid the contract to have been *inper altum mare*, yet the Court took notice of it as done at Rotterdam; but being in the *voyage*, and occasioned by a stress at sea, it was held well enough within their jurisdiction, and that the hypothecation of ships is absolutely necessary for the preservation of navigation; for the masters have nothing else to get credit with, and they are the only Court can give them remedy; if a ship in harbour here in England be hypothecated, they shall not sue for it there; master cannot at any time sell, but he may hypothecate in voyage for necessities; but the libel being against the ship and party, the Court said, they would send a prohibition as to him unless quatenus it is necessary to make him party towards the condemnation of the ship; and so it was done.

Comb.

Comb. 785. Corfet v. Huseley Trin. 1 W. & M. in B. R. the S. C. and a consultation awarded by the whole Court; and Dolben J. said, he wondered that this could be made a question, since it was admitted that the money was for the use of the ship, but if the master had employed the money to his own use, a prohibition should have gone.

27. Executor of the master of a ship libelled in the Admiralty Court for wages owing to the testator by the owner; but a prohibition was granted. 1 Salk. 33. pl. 4. Trin. 12 W. 3. B. R. Clay v. Sudgrave. Ld. Raym. Rep. 576. Clay v. Snelgrave S. C. accordingly. Carth.

518. S. C. says, in this case it happened, that the owner was beyond sea, and the counsel for the administrator insisted that no prohibition might go, unless some sufficient person would appear and put in bail in an action to be brought against him; because otherwise this debt might be lost; and the Court thought it reasonable so to do; but afterwards a rule was made for a prohibition absolutely without any condition. — Ld. Raym. Rep. 578. S. P. moved by Northey, who said, that this had often been done; and Holt Ch. J. confessed, that the Court had sometimes interposed and procured bail to be given; but then it was by consent, and in case of the proprietor himself; but in regard that in this case the plaintiff was a purchaser without notice, there was no reason; and a prohibition was granted.

28. A ship put into Boston in New England, and there the master took up necessaries and gave a bill of sale by way of hypothecation, for the payment of the money; and now upon a suit against the ship, and the owners, a prohibition was granted as to them, because the Court held, that the contract of the master cannot make the owners personally subject to a suit; but as to the suit against the ship a prohibition was denied, because the master can have no credit abroad, but upon a hypothecation of the ship, and it is not reasonable to hinder the Admiralty from giving a remedy where we can give none ourselves. 1 Salk. 35 pl. 9. Trin. 2 Ann. B. R. Johnson v. Shippen. 6 Mod. 79. S. C. and S. P. held accordingly, and the libel being against the ship and the party, the Court said, they would send a prohibition as to him, unless quatenus it is necessary

to make him a party towards the condemnation of the ship; and so it was done. — 11 Mod. 36. S. C. accordingly. — 2 Ld. Raym. 984. S. C. accordingly.

29. The master took process out of the Admiralty, against the owners, to arrest the goods landed at Bristol in causa salvagii. Before appearance it was moved for a prohibition on affidavits of the matter before libel, whereby it appeared that the goods landed were arrested in causa salvagii. But per Cur. though the goods are now arrested at land, yet the salvage, which was the cause of the arrest, might be at sea, which will appear by the libel, and therefore a prohibition was denied till appearance or libel exhibited, and the rather because the party may have remedy by trespass or replevin, and this is not like SANDS'S CASE, where on process to stay a ship in the river a prohibition was granted before appearance; for that process was not for an appearance as this is, but was in nature of an execution. 1 Salk. 35. pl. 8. Mich. 2 Ann. B. R. Tranter v. Watson. 2 Ld. Raym. Rep. 931. Tranter v. Watson S. C. accordingly, and a prohibition denied — 6 Mod. 11. S. C. and rule for prohibition discharged.

30. It was moved for a prohibition to a suit in the Admiralty for seamen's wages on a suggestion that the contract was made by deed at land. But upon reading the suggestion it appeared to be general, that the contract was made at land.

The suggestion was amended and made *per scriptum*. But the Court held it insufficient; for it might be by writing and yet not by deed, and if so it is only a parol contract, and the agreement was urged to be special, yet the Court held, that did not draw it from the Admiralty's jurisdiction; and the motion was denied. 2 Ld. Raym. Rep. 1206. Mich. 4 Ann. Bennis v. Parre.

Powell J. said, he remembered a case of the like nature, where a suit was commenced in the Court of Admiralty by seamen for their wages, upon the arrival of the ship at Newfound-

land; and though the merchants all held it no port of delivery, yet the Court of Admiralty held the contrary. And so did the Court of C. B. upon a motion for a prohibition. 2 Ld. Raym. Rep. 1248. S. C.

31. A motion was made for a prohibition to the Court of Admiralty in a suit there by seamen for their wages upon a suggestion that the Court refused to allow the defendant's allegation that the place, upon the arrival at which the plaintiffs intitled themselves, was not a port of delivery; and that they refused to receive the allegation, unless the defendant would bring the money demanded into Court. But the Ch. J. and Powell held, that the Admiralty Court were the judges of that matter, and that if they did not do the defendant right, his only remedy was by appeal; but it was no ground for a prohibition; the suit here was for wages upon the arrival of the ship at Guinea. 2 Ld. Raym. Rep. 1247. Pasch. 5 Ann. Brown v. Benn, & al.

32. A prohibition does not lie to the Admiralty Court before sentence, though otherwise it is as to the Spiritual Court. Holt's Rep. 49. pl. 5. Pasch. 5 Ann. Brown's Case.

33. The defendant and other seamen libelled in the Admiralty Court for their wages, and set forth in their libel, that they went to such a place, or coast in the East Indies, and that the plaintiff had not paid them their wages &c. Sir James Montague moved for a prohibition, for that Court will not by their way of proceeding, receive our answer but upon oath; by which means we shall be forced to discover that we traded to the East Indies, and so incur a penalty inflicted by act of parliament which is general, prohibiting all the subjects of England to trade or traffick there, except they have a licence, or are of the East-India Company. Besides, these mariners have a contract under hand and seal for their wages, on which they may sue at law. But the prohibition was denied; for it is reasonable and just, whether their going thither was lawful or not, that you should pay them their wages; there is no unlawful act suggested, and if there be a contract under hand and seal for their wages, yet the Admiralty may have jurisdiction thereof as incidental; but if they judge contrary to our law, we will prohibit them. But they on the other side deny the contract to be as you have alleged. Holt's Rep. 49, 50. pl. 6. Mich. 5 Ann. Gawn v. Grandree.

34. A prohibition was prayed, because there was a suit for wages and for expences in travelling by seamen, quoad the travelling expences which were due to them in going by land from one ship to another, but belonging to the same master, sed non allocatur;

catur; for shall the seamen be turned on shore &c. and to travel from one place to another without having their charges or wages born &c. Per Powys senior Eyre, and Powys junior. Hill. 12 Ann. Reg. B. R. ex motione Mr. Whitacre.

35. A prohibition was prayed by the owners of a ship to stay a suit in the Admiralty by the master and seamen against the freight of a ship, because the suit ought to have been against the ship or the owners of it, not against the freight as here. Sed non allocatur, for the seamen may join, and by their law they may lay hold of the ship, and if by their law they can lay hold of the freight too, why should we prohibit them? Besides was there ever a prohibition granted at the suit of a 3d person, as here you pray it, but a prohibition only as to the master? Mich. 12 Ann. B. R. Neclanham v. Foliam & al.

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36. A master of a ship sued in the Admiralty for his wages and laid the contract to be made *infra fluxum & refluxum maris infra jurisdictionem Curiae Admiralitatis*; but a prohibition was denied to be given, because it was *after sentence*. 2 Ld. Raym. Rep. 1452. Mich. 13 Geo. Barber v. Wharton.

(E. 4) Admiralty. Pleadings.

1. **T.** Brought account for goods against P. in C. B. and thereupon P. sued T. in the Court of the Admiralty, supposing the goods to have been received in foreign parts beyond the seas: and the said T. being committed for refusing to answer upon his oath to some interrogatories there proposed to him, brought his *babeas corpus*, which was returned thus, Ego William Pope Marefcallus supremæ Curiae Admiralitatis Angliæ Dom. Justici. fereniff. reginæ nostræ in brevi huic schedulæ annex. specificat. certific. quod infra vocat. T. ante advent. istius brevis capt. fuit & custodiæ meæ commiss. ex eo quod dictus T. vinculo Sacramenti coram Judice Admiralitatis Angliæ astrictus ad respondend. quibusdam articulis contra eum in dicta Cur. dat. &c. sub pœna quinque librarum, &c. contumaciter examen suum subire recusavit, idcirco, &c. and it was resolved by the Court of Common Pleas; That the return above-mentioned was insufficient as being too general, because it is not specified for what cause or matter T. was examined, so as it might appear that the interrogatories were of such things, as were within their jurisdiction, and that the party ought by law to answer upon his oath, for otherwise he might very well refuse. 12 Rep. 103, 104. Hill. 2 Jac. Tomlinson v. Philips.

2. A libel in the Admiralty laid a contract *apud malaga infra districtas maris vocat. the Streights of Gibraltar* infra jurisdictionem maritimam, and a prohibition was granted, because it appeared that the contract was made in the island of Malaga, Hob. 79. in pl. 104. S. C. cited according-ly.

Malaga, and then the adding *infra jurisdictionem maritimam* is void. Hob. 213. in pl. 270. cites Mich. 9 Jac. Audley v. Jennings.

3 Bull. 205.

Trin. 14

Jac. S. C.

the count

only said,

quod in

statuto con-

tinetur) but

the Court

held it to

be no error,

and so like-

wise as to

the count

being (inter

alia enaci-

tatum fuit,) and judgment affirmed.

Roll. Rep. 203. pl. 5. and 210. pl. 51. S. C. but

S. P. does not appear.

3. In an action upon the case for suing in the Court of Admiralty, for a thing done in corpore comitatus the count was quod per Statut. 13 R. 2. inter alia, it was enacted, that the jurisdiction of the admiral shall extend only to things done, super altum mare; and it does not recite the whole statute; nor that it was in parliament; yet adjudged good and affirmed in error; for it cannot be a statute unless it be made in parliament; and nobody is bound to recite any more of a record than what is sufficient to induce the action; as in debt upon a judgment it is sufficient to recite only the judgment. Jenk. 323. pl. 34. cites Fleming v. Yates.

Godb. 385.

to 390.

pl. 474.

Pasch. 3

Car. B. R.

[540]

the S. C. but

I do not ob-

serve S. P.

4. *Trespass for breaking a ship and carrying away her sails.* The defendant justified by a warrant from the Admiralty to arrest the ship and keep her safe, by virtue whereof he entered and carried away the sails, which is the same trespass. It was objected, that the breaking the ship was not answered, neither was there any warrant to carry away the sails; but per Cur. the plea is good; because the entry-into the ship by virtue of the warrant is in law a breaking it, as *clausum fregit* &c. and that he might carry away the sails; for this is the manner of their proceeding, and grounded on reason, because he could not keep her safely, if the sails are not carried away. Latch. 188. Mich. 2 Car. Creamer v. Tookley.

5. H. brings an action of false imprisonment against G. The defendant pleads a special justification, that he took and imprisoned the plaintiff by virtue of a commission granted out of the Court of the Admiralty, to examine the taking away of certain goods which were wrecked by the sea. The plaintiff demurred, because the defendant has not set forth the custom of the Admiral Court, that the first process thereof is a *capias*, and so it appears not whether he have proceeded right or not. 2dly, It does not appear that the matter for which the commission was granted is maritime, and other matter they ought not to meddle withal. The rule of Court was to shew cause why judgment should not be given against the defendant upon this plea. Sty. 64. Mich. 23 Car. Hull v. Gurnet.

6. A libel for a ship taken by pirates, and sold at Tunis, but made no mention that the ship was taken *super altum mare*; and though there was contained therein very much to imply it, yet the Court held that to be absolutely necessary to support their jurisdiction. Vent. 308. Pasch. 29 Car. 2. B. R. Anon.

Show. 6.

S. C. and

the Case in

7. *Trespass for taking a ship* &c. The defendant pleads, that he was captain of a man of war, and that he took her on the high seas
as

as a prize, and carried her to and there prosecuted her, and condemned her in the Admiralty as a prize &c. Upon demurrer Holt Ch. J. held, that he was captain was well enough; he need not shew his commission; but it does not appear how this ship came to be a prize, nor that there was any cause to seize her as such, nor that there was any war; the subsequent going to the Admiralty cannot justify the first illegal caption. Besides, it is not shewn whose Court of Admiralty it was, nor before what judge. Judgment pro quer. by the whole Court. N. B. This was an interloper seized by the East India Company, and carried to the Indies, and there condemned by the Company's admiral &c. Holt's Rep. 47. pl. 1. Pasch. 1 W. & M. Beake v. Tyrrel.

Holt's Rep. 47. is copied thence. — Comb. 120. S. C. adjudged for the plaintiff. — Carth. 31. S. C. resolved. — 3 Mod. 194. Beak v. Thyrwit, S. C. adjournatur.

For more of the Court of Admiralty, See 4 Inst. 134. Cap. 22. and Prynne's Animadversions, Amendments of, and additional Records to 4 Inst. 75. to 134.

Cinque Ports.

(E. 5) The Jurisdiction of the Cinque Ports.

1. 28 E. 1. **T**HE Constable of Dover Castle shall not hold cap. 7. plea of any foreign country within the castles, except it concerns the keeping of the castle; neither shall he distrain the inhabitants of the 5 ports to plead elsewhere, or otherwise than as they ought, according to the form of their charter, confirmed by the great charter.

He that is the Constable, or Lieutenant, or Keeper of the castle of Dover, is also the

Warden of the Cinque Ports; and the king's writs directed to him are directed Rex &c. B. constabulario castri sui de Dover, & custodi quinque portuum suorum; but he is commonly called Lord Warden of the Cinque Ports. The cinque ports are, Hastings, Dover, Hith, Romney, and Sandwich, whereunto Winchelsea and Rye (as mozt of note) and other towns be adjoined. [541]

2 Inst. 556.

The Constable of Dover, and Lord Warden, has two jurisdictions, viz. The authority of an admiral, and to hold plea by bill concerning the guard of the castle &c. according to the course of the common law, and of this jurisdiction doth our statute speak. 2 Inst. 556, 557.

2. A. brought debt in London by writ in C. B. against the gaoler of the Cinque Ports, because he had J. N. who was condemned to the plaintiff, in execution, and suffered him to escape in London. The defendant pleaded nul tiel record. The justices write to the Constable of Dover, and he over to the Barons of the Cinque Ports. Br. Cinque Ports &c. pl. 26. cites 30 H. 6. 6. And Brooke says, et sic vide that the justices of C. B. may write to the Constable of Dover for a record of the Cinque Ports.

3. Recovery in bank of lands in the Cinque Ports is good as it is in ancient demesne, or of lands where consuance of pleas is; and yet in other actions of the same land again at another time, the tenant may plead that it is in the Cinque Ports in the one case,

and the lord may demand conufance in the other cafe, and fo the nature of the land by this recovery is not changed. So it feems of recovery in bank of land in London. Br. Cinque Ports, pl. 24. cites 36 H. 6. 33.

4. It was faid, that the Cinque Ports are not by grant of the king, nor by prefcription, but by an aft an in ancient parliament. Quære. Br. Cinque Ports, pl. 23. cites 12 E. 4. 17, 18.

5. In trefpafs it was faid arguendo, that *recovery in C. B. of land which lies in Chefter, Durham and Lancafter, is void; contra in the Cinque Ports; quære & ftude diverfitatem.* Br. Cinque Ports, pl. 24. cites 9 H. 7. 12.

6. The Conftable of Dover, who is Warden of the Cinque Ports, fhall not hold plea of a thing which arifes in the county out of the Cinque Ports, Br. Jurifdiction, pl. 99. cites F. N. B.

7. The Conftable of Dover, who is Warden of the Cinque Ports, cannot hold plea of a thing which doth belong to be determined in the county, if it be not of a thing concerning the keeping of the caftle of Dover; and if he does, the party fhall have a writ directed unto him to furceafe, and upon the fame an alias, and a pluries, and an attachment. F. N. B. 240. (B)

8. If the conftable holds plea of any thing of which he ought not for to hold plea, the party fhall have his action upon the ftatute, although he does not fue forth any writ before directed to the conftable. F. N. B. 240. (C)

9. The defendant was committed becaufe he would not answer, the land lying in the Cinque Ports, Toth. 215, cites 40 Eliz. Langham v. Beachampe.

Velv. 12. S. C. and the plea adjudged ill; for though the Cinque Ports have divers grand liberties, yet the reafon of the grant of thofe liberties was for the eafe and benefit of

10. Appeal of murder was brought in B. R. of a murder done upon the plaintiff's brother at S. in the county of K. It was objected that it did not lie, becaufe S. was within the Cinque Ports where the king's writ does not run, and that the Cinque Ports nor any part of them are within the county of Kent, All the juftices delivered their opinions feverally that the plea was not good for the matter; becaufe this action of appeal is higher than an action real or perfonal, and in fome fort concerns the queen; and in fuch cafes as concern the queen it is no plea to fay that it is within the Cinque Ports, as in a quære impedit. Cro. E. 910, 911, Mich. 44 & 45 Eliz. B. R. Crisp v. Verral.

the inhabitants and not to their prejudice. A 2d reafon was, becaufe the defendant having done the murder within the Cinque Ports and flying out of the Cinque Ports, if the pleading here fhould be good, there would be a failure of juftice; for thofe of the Cinque Ports cannot try him, becaufe he is not there. Popham faid, if the defendant had fhewn that at the time of the murder fuppofed, and ever after he had been and was an inhabitant and commorant within the Cinque Ports, and fo by his plea he had given jurifdiction to the Court here, and they as judges prayed to have view, that the defendant, if guilty, might have received a fatisfactory judgment, viz. death for death, then the plea had been good; but the defendant has not fhewn any fuch thing whereby it appears that this Court of the king has fo much jurifdiction. A 3d reafon was added by Gawdy, Fenner and Yelverton J. becaufe this Court of B. R. is the moft High Court of Juftice, and of greateft Sovereignty; and though the Kings before have granted conufance of appeals to the Barons of the Cinque Ports, yet this does not give away the queen's intereft as touching herfelf, and in this appeal the queen has intereft by a meane; for if the plaintiff be nonfuit after declaration or releases (according to 29

H. 6. Corone) yet the defendant shall be arraigned at the suit of the queen. And further all the Court held the plea double and repugnant; the one is, that Sandwich is parcel of the Cinque Ports, ubi breve domine regine non currit, which is a matter in law put in the judgment of the Court; the other is, that it is not in the county of Kent, which by the first plea is denied, viz. by saying that is parcel of the Cinque Ports &c. and yet by the other part it is utterly denied to be in the county of Kent and so repugnant; and also in truth all the Cinque Ports are parcel of the county, though by their charter they are exempt from being drawn in plea within the county generally.

11. Of such things whereof the Constable of Dover and lord warden hath jurisdiction, he is the immediate officer to the Court, and as it has been said, writs shall be directed to him as in all real actions &c. for land within the Cinque Ports. 2 Inst. 557.

12. They of the Cinque Ports have great liberties and privileges, in respect of their necessary attendance in the ports for the defence and safety of the realm. 2 Inst. 557.

13. If a præcipe be brought against one for land within the Cinque Ports and he appears and pleads to it, and judgment be given against him in C. B. this judgment shall bind him for ever; for the land is not exempted out of the county, and the tenant may waive the benefit of his privilege. 2 Inst. 557.

14. The Cinque Ports are not exempted out of the county for divers causes. 1st. The Constable of Dover has no general jurisdiction within the Cinque Ports, but it is limited; for example, if a man be murdered in any of the Cinque Ports the wife shall have an appeal against the murderer directed to the sheriff of the county, and he shall execute the writs within the Cinque Ports; for the constable hath no jurisdiction to hold plea thereof as it was resolved. Trin. 42 Eliz. in an appeal brought by MAES v. BAYNES, for the murder of her husband at F. in the county of K. 2 Inst. 557.

15. And so it is if he be in custodia marescalli, the appeal may be brought by bill against him for murder in any of the Cinque Ports. 2 Inst. 557.

16. Also if the Constable of Dover hold plea of a foreign plea, contrary to the purport of this statute, an action upon the statute doth lie against him, and the writ may be directed to the sheriff of the county, and he may serve it within the Cinque Ports. 2 Inst. 557.

17. Prohibition was moved for to the Court of Dover, for that they held plea there by plaint, in nature of a writ of partition between tenants in common, but they having proceeded to judgment and execution, all the Court held it too late for a prohibition, inasmuch as there is no person to be prohibited, and possessions never were removed or disturbed by prohibitions. Sid. 165, pl. 24. Mich. 15 Car. 2. B. R. Hall v. Norwood.

18. They may hold plea of franktenement in the Cinque Ports; for otherwise there will be a failure of justice. Per Keeling J. Sid. 166. in pl. 24. Mich. 15 Car. 2. B. R.

For though they have a chancery in the Cinque

Ports, yet they do not make any original writs there, but it serves only to decide matters of equity; per Keeling J. Sid. 166. in pl. 24. Mich. 15 Car. 2. B. R.

19. The great use of their chancery there is to be relieved against errors in proceedings at law, the which errors they use to indorse on the bill; and the reason of this is, because the writ of error of those judgments lies only at Sheppy, the which place if it be admitted to be known, yet the lord admiral has not held Court there for a long time. Sid. 356. in pl. 6. Hill. 19 & 20 Car. 2. B. R. at the end of the Case of Ting v. Merriwether in a note there, says, sic dictum fuit. And Twissden J. said, that writ of error or *certiorari* lies to the Court of Sheppy, though not from that Court to the inferior Courts there, and that so the books which speak of error to the Cinque Ports are to be understood, quod nota.

20. A *certiorari* was sent to W. for a record that they had made, whereby they had taxed the foreign; and they return that they had made taxes for the foreign for the preservation of the corporation, and to raise ammunition to provide against invasion of foreigners; and shewed that W. was one of the Cinque Ports, *ubi breve domini regis non currit*. Per Hale Ch. J. you ought to set forth that there was some jurisdiction to which the party might appeal if he were injured, otherwise the corporation will be party and judges and all, and they will tax the lands of the foreign to what value they please. Freem. Rep. 99. pl. 111. Pasch. 1673. Anon.

21. Upon an appeal from a sentence in the Admiralty of the Cinque Ports, the lord warden granted a commission of delegates, and upon a demurrer to a bill for that the plaintiff did not set forth that the lord warden had authority to grant such commission, the Court made no order as to that matter, but could not relieve the plaintiff, because the appeal was not within 15 days after the sentence. Fin. R. 437. Mich. 31 Car. 2. Denew v. Stock.

(E. 6) In what Cases the Writ of the King runs thither. And of Returns thereto.

1. **C**ERTIFICATE upon a statute merchant the sheriff returned quod non est inventus &c. Thorp prayed writ to the Constable of Dover and to the Wardens of the Cinque Ports, inasmuch as the lands are there, and the sheriff may make execution there, and for this cause the writ was granted him. Br. Cinque Ports, pl. 6. cites 21 E. 3. 49.

2. Debt by H. and H. against T. as heir; who pleaded nothing by descent. The plaintiff replied *offits at such a place within the Cinque Ports*. And so it was found by a jury of the county adjoining, and judgment given of the moiety of his lands, as well those by descent as by purchase; and a writ awarded to the Constable of Dover, to extend the lands within the Cinque Ports. But it was said, that first the plaintiff ought
to

to have a certiorari to send the record into the Chancery, and from thence by mittimus to the Constable of Dover. 3 Le. 3. pl. 7. 3 & 4 Ph. & M. Heck v. Tirrell.

3. *A contract* was made between A. and B. in London, after wards A. left the city and dwelt within the Cinque Ports; and being afterwards impleaded upon this contract he claimed his privilege of the Cinque Ports, and cited 12 E. 4. that those of the Cinque Ports shall not be sued elsewhere than within the Cinque Ports. Shute J. said, that this was true for any matter arising within their jurisdiction; but where a man gives a bond of 100l. or a 1000l. and then goes and dwells in the Cinque Ports, perhaps the obligee might lose his debt; and adjudged he shall not have his privilege. Godb. 90. pl. 102. [544] Mich. 29 Eliz. B. R. Anon.

4. *If a stranger does trespass &c. in the Cinque Ports &c. the suit shall be by writ*, lest the trespass should be dispunishable. 2 Inst. 557.

5. *The privilege extends to certain particular towns, whereof the king's courts cannot judically take notice.* 2 Inst. 557.

6. *B. being imprisoned by the Lord Warden of the 5 Ports, a habeas corpus was awarded to the Warden, who refusing to obey it, then an alias habeas corpus was with a penalty*, the Warden pretending that the king's writ did not run there. Resolved by all the Judges that the king's writ did run there, and especially this writ which is a prerogative writ, which concerns the king's justice to be administered to his subjects; for *the king ought to have an account why any of his subjects is imprisoned, and no answer can satisfy it, but to return the cause paratum habeo corpus*; wherefore the Court all held that another habeas corpus should be awarded under a great penalty, returnable at another day. Cro. J. 543. pl. 3. Mich. 17 Jac. B. R. Bourn's Case.

required to restore them he refused, and upon a habeas corpus to the lord warden, he returned the body and the cause. The Court held, that if no cause had been alledged in the return they might then deliver the prisoner, but the lord warden having returned cause that the party was cited, and judgment given secundum leges maritimas, which B. R. on a habeas corpus cannot redress, though it be unjust; for when they proceed against him judicially this Court cannot reform, though otherwise if without cause. For habeas corpus questionem solvit de cco, and not if the judgment be good or not; for if the prisoner when cited and required to restore the anchor had there intitled himself, in such case, as Doderidge said, it might be removed by Stat. 15 R. 2. and when he confesses the taking to be within their jurisdiction, and denies to restore it, the Court here will not intend the judgment against him to be unjust; and it appears that they have jurisdiction of it; and there is a difference when they commit him secundum leges maritimas, and he is in execution by judgment there, and when they commit him without cause. And the Court awarded, that the prisoner be remanded, and pay according to the judgment below, and that then he might have false imprisonment, or debt, and recover his money and damages if the cause be not true and good. ————— 2 Roll. Rep. 157, 158. Barnes's Notes C. P. S. C. accordingly.

7. *Certioraries to remove an indictment taken in the Cinque Ports should be immediately directed to the justices before whom the indictment was taken, because they hold plea of it as justices of peace*, by virtue of their commissions, and not by their ancient charters or prescription. Cro. C. 253, 254. at the end of pl. 3. cites Mich. 8 Car. Anon.

8. Pro-

8. *Prohibition* was moved for to the Cinque Ports, for *that they held plea there, partly by the Chancery, and partly the Admiralty, in the same cause, (viz.) 'an Admiralty process upon a Chancery bill;* it was agreed that they have those distinct Courts there, but it was denied that they may so confusedly hold plea. 2dly, It was objected, that the defendant had appeared, and so had owned the jurisdiction, and the cause was ready for sentence; but per Cur. since a prohibition lies to the Cinque Ports, this Court shall not be ousted of jurisdiction by any owning of the party. Sid. 355. pl. 6. Hill. 19 & 20 Car. 2. B. R. Ting v. Merriwether.

9. A *quo minus* lies in the Cinque Ports as well as within a county palatine, or in Wales, and rather in the Cinque Ports than in a county palatine, because a county palatine has jura regalia within itself, and it is usual to grant prohibitions into county palatines; and so it was done last term to the county palatine of L. upon a suit commenced here by *quo minus*, and afterwards a bill preferred there to stay it; and so it would be if a suit were commenced in the Admiralty, there against law a prohibition would lie, and the king's debtor has the same privilege that the king has, to sue for his debt where he will; it would else be very inconvenient, if a private jurisdiction might do what they would, and there would be no remedy elsewhere. Hard. 475. Hill. 19 & 20 Car. 2. in Scacc. Sir John Williams v. Lister.

[545]
Mod. 20.
pl. 53.
Anon. S. P.
and seems
to be S. C.

10. An *habeas corpus ad faciend. & recipiend.* will not lie to the Cinque Ports, but an *habeas corpus ad faciendum & subjiciendum* lies, and such was returned this term. Sid. 431. pl. 21. Mich. 21 Car. 2. B. R. Anon.

11. The defendant was in execution at Dover for 100l. recovered against him at the Court of D. The plaintiff brings a *quo minus* against him in the Exchequer for a debt of 100l. and sued out a *habeas corpus* to the Constable of D. to bring the body of the defendant. The constable upon the return set forth the privilege of D. being 'a Cinque Port town, but that return was disallowed of, because there is no place privileged in this kind, but that the king may send his writ to have an account of his subjects, though it be privileged, as to actions between party and party. It was prayed by Sir Edward Thurland, the Duke of York's attorney, that the prisoner might be remanded, because those debts which were recovered against him at D. might otherwise be lost. But it was denied by the Court; for when he is committed here he is charged as well with the judgment that he was in execution for at D. as for those that are recovered here, and if the warden discharge them before the satisfaction of those debts, he is liable to an action, Freem. Rep. 12. pl. 10. Trin. 1671. Alder v. Puifsey.

12. If a man be outlawed, his lands within the liberties of the Cinque Ports, may be seized into the king's hands, and may also be extended upon judgments; per Windham. Freem. Rep. 12. pl. 10. Trin. 1671. Alder v. Puifsey.

13. In matters that concern the king's revenue, or in matters criminal, or where the liberty of a subject is concerned, a *certiorari* would lie, Arg. Freem. Rep. 99. pl. 111. Pasch 1673. B. R. Anon.

14. *Certiorari to the mayor, jurats, and commonalty of Winchelsea, to remove an order by them made, who return, that time out of mind there have been in Kent 5 ancient towns, (viz.) Hastings, Sandwich, Dover, Rumney, and Hithe, always called the Cinque Ports; and in Sussex 2 ancient towns, called Rye and Winchelsea, which are members of the said Cinque Ports; that the said town of Winchelsea hath been time out of mind incorporated by the name of Mayor, Jurats, and Commonalty of Winchelsea; that all the said Cinque Ports, with their members, have been, time out of mind, places for ordering the preservation of shipping, and that by reason of their situation &c. have always, and ought to keep beacons and watch-houses &c. for the better maintenance thereof; that the town of W. in their common-hall, used to make taxes and rates on every occupier &c. of house or land within their town or liberty, which said privileges were confirmed by magna charta; that 1 May 32 Car. 2. they made a tax of 6d. per pound for maintaining the said beacons and watch-houses &c. The objection was, that this order did not set forth that the beacons and watch-houses were in decay, or out of repair, and so the rate unnecessary; but resolved to be well enough; for it might be dangerous to stay till the beacons were in decay, for then there would be none till repaired, which would be dangerous for the place, and it is to be presumed, that the inhabitants would not charge themselves unnecessarily, and they do all concur in the taxation; and so the order was confirmed. Raym. 448. Pasch. 33 Car. 2. B. R. Winchelsea Town's Case.*

(E. 7) Pleadings. And of Errors in Judgments [546.] there.

1. *ACCOUNT* against one as bailiff of his manor, and receiver of his money in the vill of P. and counted as bailiff in P. and receiver in the castle of P. where P. is one of the Cinque Ports, and the castle is guildable, and there per Belk. clearly no writ of the king lies in the Cinque Ports upon this of franktenement, or not, but shall be pleaded there by bill. Parn. said, P. was lately in the hands of king, and the plaintiff has it in farm of the king, so by the unity of possession the said P. is not now of the Cinque Ports; and after by award the defendant was compelled to answer to this part that was guildable, and to the other part he took nothing by his writ, and that the franchise is not extinct by the seisin of the king, and especially where it comes to the king as escheator as parcel of the honor of England; quod nota; that be
wba

Br. Brief,
pl. 86. cites
S. C.

who pleads to the jurisdiction by the Cinque Ports shall conclude, judgment if the Court will take consufance. Br. Cinque Ports, pl. 3. cites 49 E. 3. 24.

Crompt.
Jurisd. of
Courts, 138.
a. cites S. C.

2. Trespafs in D. the defendant said, that D. is within the Cinque Ports where the writ of the king does not run; *Judgment of the writ*; and so see that he did not say, judgment if the Court will take consufance, and admitted. Br. Cinque Ports, pl. 4. cites 50 E. 3. 5.

3. *Detinue of charters*; Rolf defended tort and force and no more, and said, *that the land comprised in the charters is within the Cinque Ports*; judgment if the Court will take consufance. Martin said, *you ought to say, that the place where he made the bailment, and where the writ is brought, is within the Cinque Ports, where the writ of the king does not run*; and after Rolf made full defence and imparled. Br. Cinque Ports, pl. 7. cites 7 H. 6. 22.

4. *Error in the Cinque Ports shall be reversed before the Constable of Dover, who is Warden of the Cinque Ports*; per Pole. Br. Cinque Ports &c. pl. 26. cites 30 H. 6. 6.

5. If erroneous judgment be given in the Cinque Ports, this shall be reversed by writ of error directed *custodi quinque portuum*. Brooke makes a quære if it shall not be to the Constable of Dover, that he shall write to the Cinque Ports to certify the record, and so to reverse it. Br. Cinque Ports pl. 25. cites Lib. Divisionem Curiarum.

6. An *erroneous judgment given in Cinque Ports, shall be examined before the Warden of the Cinque Ports at Shepway in Kent*, and if the mayor and jurats there have given an erroneous judgment, they shall be fined. Jenk. 71. pl. 34.

7. *The mayor and jurats of the several Cinque Ports, have power to hold pleas &c. and upon their judgment no writ of error out of the chancery does lie returnable in B. R. nor writ of false judgment returnable into C. B. but by the franchise and the custom of the Cinque Ports, such an erroneous judgment shall be by bill in the nature of a writ of error, examined coram domino custode seu gardiano quinque portuum apud Curiam de Shipway.* And if the judgment be erroneous it shall be reversed by the Warden of the Cinque Ports, and the mayor and jurats shall be fined, and the mayor removed from his place, and yet the Court is a Court of record. But 28 E. 1. extends only to Courts holden before the constable in that act mentioned, and not to the Court holden before the mayor and jurats. 2 Inst. 557, 558.

[547]
Ibid. at the
end says
tamen
Vide the
book of
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of Courts
that writ
of error lies

8. There was great contention whether a writ of error to reverse a judgment in any vill of the Cinque Ports, would lie in B. R. or a writ of false judgment in C. B. but there being no such writ in the register nor any precedent in any Court found, Lord C. Bromley by the opinion of the chief justices of both benches denied to grant one. And it was said that by the custom and usage of the Cinque Ports, *such false judgment shall be examined before the Lord Warden of the Cinque Ports,*

Ports, at the Court at Shepway, and if it be false it shall be revoked; and that the mayor and jurats who gave the judgment shall be fined, and the mayor deposed from his office. D. 376. a. pl. 23. Pasch. 23 Eliz. Anon.

there, fol. 2. and that Brooke accords and vouches it at tit.

Cinque Ports. — Br. Cinque Ports, pl. 25. cites the same book, but says quære, if it shall not be to the Constable of Dover that he shall write to the Cinque Ports to certify the record and so to reverse it.

9. *Ejection of lands in A.* the defendant pleaded that *A. prædict. ubi tenementa jacent lay within the Cinque Ports*; the plaintiff replied that it is within the county of *Sussex, absque hoc that A. is within the Cinque Ports*; it was said that the traverse was not good, for that part of *A.* (as the truth was) lay within the Cinque Ports. The Court held the replication and traverse both good, for by the defendant's plea it shall be intended that all *A.* is within the Cinque Ports, and the *ubi tenementa jacent* are idle words, and it was on the defendant's part to have shewed, that part of *A.* lay within and part without the Cinque Ports, which because he has not shewed it, the plaintiff has advantage, by traversing that *A.* is not within the Cinque Ports. Cro. J. 692. pl. 5. Mich. 22 Jac. B. R. Austen v. Royden.

Win. 113. Austin v. Beadle S. C. resolved, that the traverse was good and that the defendant in his plea ought to have made the distinction and that the traverse here ought to be to the *ubi*, and

the Court does not imagine any fractions of towas.

10. *Trespass*; the defendant pleaded that it was committed within the liberty of the Cinque Ports, and set forth the privilege of the Cinque Ports. The plaintiff demurs, because he does not say that he was an inhabitant there; and judgment against the defendant, for if this plea should be admitted to be good, then trespasses committed within the Cinque Ports by one that lived out, or would presently absent himself, would be dispunishable; and the reason of the privilege of the Cinque Ports is, that the inhabitants there, who are to defend the port-towns should not be drawn away; which does not extend to strangers. Freem. Rep. 12, 13. pl. 11. Trin. 1671. C. B. Thomson v. Fokes.

For more of Cinque Ports, See Crompt. Jurisdiction of Courts, 137. to 142. — 4 Inst. 222. to 225. Cap. 42: — Pryn's Animadversions &c. on 4 Inst. 152. to 155. &c.

(F.) Courts of the Forest.

Justice Seat.

In what Places it may be held.

[1. A Justice seat may be summoned to be held within the forest, and after the Ch. J. in Eyre upon his coming there at the time appointed (*) may adjourn it to any place within the county,

* Fol. 534.
Cro. C. 409.
pl. 3. S. C.

adjudged.
 ——— Jo.
 347, 348.
 S. C. ———
 See Jo. 297.
 where there
 was an ad-
 journment
 to Baginot,
 Sept. 16.
 1633.

county, though it be out of the forest. Trin. 11 Car. B. R. *between the King and *Basil Brook* and *Master George Mynde*, adjudged upon demurrer, where the case was, that a sci. fa. was brought against them to shew cause why execution should not be granted against them, for several fines adjudged against them at the justice-seat for the forest of Dean, which was summoned within the forest, and from thence adjourned to the castle of Gloucester, and there held, and they there indicted and fined; and the defendants pleaded that the said castle of Gloucester, where it was held, was out of the forest; and upon this the Attorney-General demurred. But after the defendants submitted themselves to the king, and therefore would not any further defend; but upon Oyer of the record the Court inclined, that it was well held at Gloucester, and therefore gave judgment for the King and Attorney; and the Court said, there were many precedents accordingly.]

[2. Mich. 11 Car. B. R. A *scire facias* was brought against *Rowles* upon recognizance taken by the Ch. J. at the said justice-seat held in the said castle as aforesaid; and it was pleaded in bar thereof by myself, that the said castle was out of the forest; upon which it was demurred by the Attorney-General, and now adjudged for the king, for the reason aforesaid, and the Court also said, that the Ch. J. may take a recognizance in any place, though it be not at any justice-seat.]

For more as to the Justice-Seat, and the Court of the Forest, See *Manwood's Treatise of Forest Laws*.

(G) Courts. King's Bench.

[*Its Power as to Issues sent thither out of Chancery to be tried there, and as to Records coming there.*]

* Fitzh.
 Petition,
 pl. 3. cites
 S. C.

[1.] F a petition be endorsed, that the chancery shall send a verdict returned there, B. R. where the justices shall do right the verdict itself ought to be sent, and not a tenor only. * 22 E. 3. 5. 38 E. 3. B. R. Rot. 16. It was shewed to the parliament, that a manor was held of a barony of a common person, that after the manor was forfeited to the king, and he granted it to another to hold of himself per servitium militare, ubi per legem deberet dici, tenendum de capitalibus dominis feodi illius &c. et petit, that the said charter be amended in the said clause; upon which was a plea in chancery, and found by escheator, & per juratam here to be true. Et quia judicium super veredicto

dicto prædicto, & executio judicii pertinent ad officium cancellarii facienda ideo mittitur in cancellariam, & datus est dies usque &c.]

[2. If a record be once come into B. R. this can never be remanded. 22 E. 3. 6. b. * 29 Aff. 43. per Sharde † 40 Aff. 29. 19 Aff. 4.]

* Br. Record. pl. 46. cites S. C. & S. P. by Shard; and

Brooke says, quod nota, whether it be by writ or error or otherwise as it seems, quod non negatur.

† Br. Record pl. 46. cites S. C. and S. P. and therefore in case of writ of error of fines the tenor only shall be removed and not the fine itself; for in case of a fine if the judgment shall be affirmed there is no chirographer in B. R. to ingross the fine. — Ibid. pl. 79. cites 5 Mar.

1 Nota, that in B. R. are divers precedents that in writ of error on a fine, the record itself shall be certified so that no more proclamations shall be made, and if they are reversed this makes an end of the whole, but if they are affirmed then the record shall be sent into C. B. by mittimus to be proclaimed and ingrossed, quod nota; for if the transcript only be removed they may proceed in C. B. notwithstanding; quod nota. — When a record comes into [549] B. R. it shall never be remanded but in the same term in which it comes in; per Coke Ch. J. Roll. Rep. 85. in pl. 39. — If a record be filed in B. R. it can never be sent down, or remanded either in the term it is filed in or any other, and that is plain by the act of 6 H. 8. cap. 6. which enables this Court to do it in that case of felony, which otherwise they could not have done; per Holt Ch. J. 1 Salk. 35a. pl. 13. Trin. 3 Ann. B. R. in Case of Fazakerly v. Baldo. — 6 Mod. 171, 178. S. C. & S. P. accordingly.

[3. If it be found by inquisition in chancery, that a copyhold was granted to J. S. in fee in trust for J. D. who was an alien amy for which the copyhold was seised into the king's hands; upon which charge of the inquisition, J. S. comes and traverses the trust, and prays to be restored to the possession, and issue is joined in chancery upon the trust, and thereupon the record is delivered over by the hands of the commissioners of the great seal to B. R. to be tried, and there a verdict is found for the king, and after moved in arrest of judgment that there is not any cause for the king to seise the (*) copyhold, and so by consequence the inquisition void; for it was conceived, that the trust of a copyhold of inheritance in an alien is not given to the king. But it was resolved per Curiam, that though it should be admitted, that the king shall have this trust yet he cannot seise the copyhold, and by this have the possession, but ought to be relieved in a Court of equity, and that the King's Bench is not only to try the issue, but ought to give the same judgment upon the record, which the chancery ought to have given there; though it was objected, that the record remanded in filaciis of the chancery, as this record transmitted mentions; yet because this record shall never be remanded in chancery, but judgment is to be given here, the Court here shall give judgment according to the law upon the record here, according to the case upon the record made, between the king and the party; and therefore the judgment ought here to be given against the king, and that J. S. shall be restored to his possession. P. 24 Car. B. R. between the King and Holland, adjudged; Intratur, Tr. 21 Car. Rot. 20.]

* Fol. 535.

All. 14 &c. S. C. resolved per Cur. that judgment ought to be given against the king, because the whole record is virtually here, otherwise they should be bound up to the verdict, so that judgment should be given according to that, though it appears upon the whole record that the plaintiff has no title; and the judges denied that chancery

could proceed upon the inquisition, now that the same was sent hither upon the traverse, but that the judgment in B. R. would utterly subvert the inquisition; and judgment was given quod manus domini regis amoveantur. — Sty. 20. S. C. argued sed adjournatur. Ibid. 40. S. C. argued sed adjournatur. Ibid. 75, 76. S. C. the Court ordered cause to be shewn the Tuesday following why

why the party should not be restored to his lands. Ibid. 84. S. C. a motion was for an *amoveas manum* to the chancery, that the party might have his land out of the king's hand; but the Court said that the judgment is to be given here, if there be cause for the king, and if not then against him, and you ought not to go to the chancery, and that all they can say is that the king shall not have judgment. Ibid. 90. S. C. & S. P. and that the chancery cannot do any thing in the cause; for they have nothing before them, and restitution ordered nisi causa. Ibid. 94. S. C. & S. P. accordingly by Roll and Bacon. Sed Cur. advis. vult.

4. Of a thing which touches the king mediately or immediately, they shall receive appeal in B. R. by bill, by which appeal of a *cup stole* was there prosecuted, and well, quod nota. Br. Bille. pl. 18. cites 17 Aff. 5.

5. *Scire facias* upon recognizance in chancery, brought in chancery, the defendant pleaded a release, the plaintiff denied it and so to issue. And the record and all the action, and process was sent into B. R. to try and there the plaintiff was nonsuited and brought a new *scire facias* there, and well; for there was the record after the sending it out of chancery, and not in chancery, and *contra* if the chancery had sent only the tenor of the record. Note a diversity; and so note that the chancery shall try nothing by jury, but the King's Bench, and it is said elsewhere that the chancery shall make the venire facias and shall award it to the sheriff returnable into B. R. scilicet nobis ubicumque tunc fuerimus in Anglia, for all the king's. Br. Jurisdiction, pl. 48. cites 24 E. 3. 45.

[550]

6. Note, it was agreed that in B. R. the record is *placita coram rege apud talem locum*, and therefore when a man pleads a record of this Court, he shall shew where the King's Bench then was, because the day is passed, so that it is certainly known, but the process there is *ubicumque tunc fuerimus in Anglia*. Br. Pleadings, pl. 10. cites 34 H. 6. 27.

21 Rep. 65.
a. S. P. by
Coke Ch. J.
in Dr. Fol-
ter's Case,
and cites 4
H. 7. 18.
and says,
that with
this agrees
15 H. 7. 5.
b.

7. If an indictment of forcible entry be removed in B. R. the justices of B. R. shall award restitution, and yet the Statute of 8 H. 6. cap. 9. speaks only of justices of peace, but the reason is because they have sovereign and supreme authority in such cases; per Cur. 9 Rep. 118. b. cites 7 E. 4. 18. a. and 4 H. 7. 18. and says, that according to this resolution the justices of B. R. write, according to the said act, to the justices of gaol delivery in the City of London, before whom the principal was who certify the record &c.

8. Murderer was committed to the Fleet by the justices of B. R. because the marshal had married the sister of the offender, and it was said, that they might have committed him to Newgate. Per Cat. the Fleet is not for felony nor treason. But per Fairfax, such a precedent was in the time of June. And the same law where the marshal is appealed of felony. And the Fleet is for the Chancery, Common Pleas, Exchequer, and to those Courts the warden is officer, and to the Star Chamber, and to the Palace; and per Cat. he may be committed to any sheriff of England, because all those are officers immediate to this Court, quære inde of the sheriff of another county where the offence was not done. But it seems that if the justices by their discretion command it, it ought

bought to be obeyed. But per Fairfax, the sheriff of Middlesex is not officer to this Court, but of things done within the same county, and the same seems to be of other sheriffs. Br. Imprisonment pl. 80. cites 21 E. 4. 71.

9. If the justices of B. R. perceive that any indictment is to be removed into that Court by practice, or for delay, the Court may refuse to receive the same before it is entered of record, and remand the same back for justice to be done. 4 Inst. 74. cap. 7.

10. A scire facias was sued in chancery upon a recognizance, where the parties were at issue whereupon all the record was removed into B. R. where after trial judgment was arrested for misawarding the ven. fac. and the parties would re-plead. And by Coke Ch. J. if only a tenor of the record had been removed into B. R. the repleader might be in chancery, but in this case the whole record is removed hither, and when this Court is possessed of a record, it shall never be remanded into chancery; for the chancery is the younger brother, and the books are, that a writ of error lies here on a judgment in chancery, and therefore it seems that the repleader ought to be here, and ruled accordingly. Roll. Rep. 287. pl. 5. Hill. 13 Jac. B. R. Bristol (Bp.) v. Proctor.

11. Where error is brought upon a judgment given in Ireland, the record remains in Ireland, and B. R. has only the transcript; but otherwise it is upon error brought in B. R. of a judgment in C. B. for there the record itself is sent into C. B. and they write transmittitur in the margin; per Doderidge J. 2 Roll. Rep. 274. Hill. 20 Jac. B. R. in Leonard's Case.

12. An indictment of high treason found in B. R. may be sent down into the country to be tried there by nisi prius at the next assizes; per Dolben and Raymond J. (Absent the Ch J.) and that so is 4 Inst. 73. and the Statute of 14 H. 6. cap. 1. gives power to the Judges of Nisi Prius, to give judgment and award execution in cases of felony and treason, which cannot be but where such offences are tried by nisi prius; for quatenus judges of nisi prius, they cannot give judgment in cases not legally coming before them; as for felony and murder, indictments removed into B. R. concerning these offences may be sent down to be determined by virtue of 6 H. 8. cap. 6. but that statute extends not to treason. Raym. 367. Pasch. 32 Car. 2. B. R. Sir Miles Stapleton's Case. [551]

13. It was moved for a peremptory mandamus after a verdict in C. B. in an action on the case for a false return to a mandamus, to inrol a chapel upon the act for liberty of conscience; to which it was returned, that this was a consecrated chapel of ease for the necessary use of the inhabitants of such a parish; but Holt Ch. J. said, that they could not take notice here of a verdict in C. B. and the verdict ought to be, as he thought, here in B. R. and therefore he did grant the motion. Skin. 670. pl. 8. Mich. 8 W. 3. B. R. the King v. Green.

(H) The Court of King's Bench. *In General.*

[1. **H**ILL. 2 Hen. 5. B. R. Rot. 65. Proclamation that *none should carry arms within the Court exceptis domino vel milite secundum eorum utriusque gradum & statum, solum gladium.*]

The kings
in former
times have
personally
sat there.
Co. Litt.
71. b.

[2. *Hen. 3. sat in person with the justices in banco regis, at the arraignment of Peter de Rivallis. Speed. 521.*]

[3. *At another time the same king sat their in person at the arraignment of Hubert Earl of Kent. Speed. 524.*]

[4. Hill. 19 Ed. 3. B. R. Rot. 35. *The king granted the custody of the seal to seal writs de B. R. to Matthew Conaceem for 16 years, in satisfactionem decem mille librarum domino regi præ manibus solutarum, and a seal delivered to the chief justice by the chancellor to seal the said writs, who delivered one part to the deputy of Matthew, and reserved the other part to himself.*]

[5. *Otto de Holland was brought to the bar coram rege assidentibus cancellario, thesaurario, comitibus Arundeliæ & Huntingdoniæ, & aliis & justiciariis de banco. His offence was, That he suffered the Count de Ewe, Marshal of France, to go armed to Calice against the command of the king, the said count being a prisoner of the king, and committed to the custody of the said Otto, and Otto non potuit deducere, ideo committitur mareschallo.*]

[6. 28 E. 1. f. 3. cap. 5. *The justices of his bench must follow the king.*]

[7. In Ed. 1st's time the style of the King's Bench was *coram rege & concilio*, and the writ de ideota examinando, commands the ideot to be brought *coram nobis & concilio nostro apud Westm.* and anciently bills were so directed in chancery, but since have been altered. Per Hale Ch. J. Vent. 158. Mich. 23 Car. 2. B. R. at the end of the Case of Fisher v. Patten.

[8. *Misdemeanor in an officer of an inferior Court is a contempt of B. R. per Holt Ch. J. 12 Mod. 374. Pasch. 12 W. 3. cited one Starkey's Case, Steward of Windsor Court.*

[552] (I) The General Jurisdiction of the Court
[of B. R.]

There is no
precedent
of a writ
of restitution
for a
constable,
per Will-
iams J. to
which the

[1. **I**F A. be elected constable in a leet, and before he is sworn the justices of peace at a sessions discharge him, because he is a master of arts, and elect and swear B. to be constable there; a writ in this case may be granted out of the King's Bench to the justices to discharge B. and to swear A. because the proper place to elect a constable is the leet, and this was no cause to discharge his election. Hill. 10 Car. B. R. *Hersan's Case*, who was

was elected in the leet of the Bishop of Winton in Waltham Wolbeck in comitatu Southampton per Curiam, such a writ granted Trin. 6 Car. B. regis. *Arundel's Case* in comitatu Dorset. like writ also granted.]

whole Court agreed clearly, and so in like case, an order was

made by rule of Court for the restoring, placing and settling of the first constable, (chosen according to custom by the vill, and approved and sworn by the lord, but removed by the justices of the peace) in his place again.

[2. If A. a constable of a hundred serves in the office for one year, and at the end of the year, the court-leet for the hundred according to custom (*) present B. to be constable, and the steward and jury refuse to swear B. but continue A. for another year; a writ may be awarded out de B. R. directed to the steward to swear B. and if there be good cause to refuse him, this may be returned to the Court. Pl. 14 Car. B. R. so done in the Case of one Braiie, the constable of the hundred of Renham in comitatu Somerset.]

Fol. 536:

The Port-Reeve of Yeovil in Com. Somerset had always been used to be elected to continue in

his office for a year, and at the year's end a new port-reeve to be elected and sworn in the leet by the steward of the lord of the manor, but upon some difference between him and the lord was refused to be done, whereupon process issued out of B. R. commanding the oath to be tendered to the port-reeve; for the Court of B. R. is the supreme Court which ought to do justice to all the king's subjects. 2 Roll. Rep. 82. Pasch. 17 Jac. B. R. the Port-Reeve of Yeovil's Case.

[3. If a man by the custom of a town is to serve in the office of tithingman for one year in his turn by the custom of the town, and he serves in the office for two years, and after the homage there continue him for a third year; a writ may be awarded out of this Court to discharge him, and to elect another: Mich. 15 Car. B. R. *Bradburn's Case*, per Curiam, such writ granted to the town of Penton in comitatu Devonize.]

4. B. R. is eyre and more than eyre, for if commission of eyre sit in one county, and the King's Bench comes there, the eyre shall cease. Br. Jurisdiction, pl. 66: cites 27 Aff. 1:

S. P. per Shard, and the case was, that escape of felons was

presented in B. R. where the statute wills, that such things shall be presented in eyre, and the parties were compelled to answer. Br. Escape pl. 21. cites S. C. — a Hale's Hist. P. C. 4. cap. 1. cites S. C. — 9 Rep. 118. 2. cites S. C. that it is more than eyre; for they shall examine the errors of the justices in eyre, gaol delivery, and oyer and terminer. And justices of B. R. have a distinct and supreme Court, and justices of gaol delivery, and oyer and terminer have other distinct and subordinate Courts.

5. If writ of error be sued upon formedon, and judgment given in it the plea shall be held on in B. R. notwithstanding the statute quod communia placita non sequantur curiam nostram &c. Br. Jurisdiction pl. 78: cites 21 E. 4. 81. [553]

6. Justices of the King's Bench, during the time that they sit in the county, may command the justices of the peace that they do not arraign the gaol upon pain and fine. Br. Judges pl. 28: cites 21 H. 7. 29: Br. Jurisdiction, pl. 54. cites S. C. But if they pro-

ceed before such command comes, then well.

7. Note that the *justices of B. R. are justices of oyer and terminer* of felony treasons &c. by the common law, and custom of the realm as was agreed, Hill. 3 M. 1. in the Case of Ben. Smith upon the statute of 2 E. 6. c. 24. of felony in one county, and accessory in another county. Br. Oyer and Determiner, pl. 8. cites 3 M. 1.

8. Albeit when the term begins, all commissioners of oyer and terminer, in the county, where the King's Bench sit, be suspended during the term, yet if an indictment be found before such commissioners before the term, there may be a special commission made to commissioners in the same county, sitting the King's Bench in that county, to hear and determine the same during the term; for the King's Bench hath no power to proceed thereupon, till the indictment be before them. And it is the better, if the special commission bear teste after the beginning of the term. Note a diversity between general commissions of oyer and terminer, and such a special commission; and the Court of King's Bench may be adjourned, and in the mean time the commissioners may sit there. 3 Inst. 27. cap. 2.

9. This Court hath not only jurisdiction to correct errors in judicial proceeding, but other errors and misdemeanors extrajudicial tending to the breach of the peace, or oppression of the subjects, or raising of faction, controversy, debate or any other manner of misgovernment; so that no wrong or injury either publick or private, can be done, but that this shall be reformed or punished in one Court or other by due course of law. 4 Inst. 71. cap. 7.

10. As if any person be committed to prison, this Court upon motion ought to grant an *habeas corpus*, and upon return of the cause do justice, and relieve the party wronged. And this may be done though the party grieved hath no privilege in this Court. 4 Inst. 71. cap. 7.

11. It granteth prohibitions to Courts temporal and ecclesiastical, to keep them within their proper jurisdiction. 4 Inst. 71. cap. 7.

12. Also this Court may bail any person for any offence whatsoever. 4 Inst. 71. cap. 7.

13. And if a freeman in city, burgh, or town corporate be disfranchised unjustly albeit he hath no privilege in this Court, yet this Court may relieve the party, as it appeareth in James Bagg's Case, & sic in similibus. 4 Inst. 71. cap. 7.

Mod. Rep.
45. in pl. 98.
per Keeling.
you cannot
oult the ju-
risdiction of
this Court
without

14. Negative words in an act of parliament, shall not in many cases bind the Court of B. R. because the pleas there are coram ipso rege, per Coke Ch. J. 11 Rep. 64. b. Mich. 12 Jac. in Dr. Foster's Case, and cites 21 E. 3. 55. b. and 21 Ast. 12. the Abbot of Westminster's Case.

And Twifden J. said, that he had known it ruled in 23 Car. 1. that the Statute of 13 Eliz. cap. 9. where it is said, that there shall be no superseatas &c. hath no reference to this Court but only to the chancery.

15. So when a statute creates a new law and assigns certain justices to execute it, though the justices of B. R. are not expressly authorised by the act, yet they may execute it as the Statute 8 H. 6. cap. 9. gives power to justices of peace to make restitution, and therefore justices of oyer and terminer gaol delivery &c. shall not make restitution, and so resolved as has been said, yet if the indictment be removed into B. R. coram rege, they shall award restitution; per Coke Ch. J. 11 Rep. 65. a. cites it as resolved on argument, 4 H. 7. 18. b. [554]

16. The Court of B. R. have power to send a prisoner to any sheriff in England. Sid. 145. pl. 2. Trin. 15 Car. 2. B. R. the King v. Mendall.

17. And commanded a sheriff by *parol* to take a prisoner, and then directed him (being sheriff of Middlesex) to go to the Recorder of London (who was then present in Court) for a warrant. Sid. 146. Trin. 15 Car. 2. B. R. the King v. Mendall.

18. King's Bench may bail for high treason, but it is a special favour, and not done without the consent of the Attorney-General. And they may likewise bail for murder, but it is seldom done, and not without a special reason; and it is not a sufficient reason that it was found manslaughter before the coroner, for it may be afterwards found murder; per Cur. Comb. 111. Pasch. 1 W. & M. in B. R. Anon.

(K) [King's Bench.]

How, and in what Manner the Court may proceed.

[1. *I*N an appeal of murder or other offence, if the plaintiff appeal him in *custodia mariscal.* and the defendant is arraigned, and pleads the same term, and the same term also is tried; this may be well done, without any bill filed, but only upon the declaration. 43 El. *Brayne's Case* adjudged. Hill. 14 Car. B. R. * *Pigot's Case*, per Curiam agreed.] Cro. E. 694. pl. 5. Watts v. Brayns, Mich. 41 Eliz. B. R. the S. C. and Ibid. 778. pl. 12.

[2. So if the defendant is arraigned, and pleads the same term, but is not tried till another term, yet this may be well done upon a declaration without any bill filed. Hill. 14 Car. B. R. between *Pigot and Pigot*, per Curiam adjudged, this being moved in arrest of judgment after the defendant was found guilty at the bar of petit treason for killing her husband, and she adjudged thereupon to be burnt. Intratur, Trin. 14 Car. Rot. 685. and said to be the practice of the Court.] S. C. Mich 42 & 43 Eliz. B. R. but in neither o the places does S. P. appear. — Cro. C. 531. pl. 10. *Pigot v. Pigot* S. C. and S. P. But per Maynard. Arg. if they not

[3. But in an appeal, if the defendant be arraigned in another term, then the defendant appears, there ought to be a bill filed; in the said *Case of Pigot* said to be the course.]

pleaded the same term, or if they had pleaded any other plea than not guilty, &

been an adjournment to another term, then the declaration ought to be filed, and of that opinion was all the Court, and Hodgesdon the secondary said, that so was the usual course. — Jo. 475 pl. 10. S. C. and S. P. accordingly, and cited the Case of Watts v. Brains. — S. C. cited 2 Roll. Rep. 478.

See 2 Inst.
§55. §56.

4. 3 E. 1, cap. 46. Enacts that it is also provided and commanded by the king, that the justices of B. R. at Westminster, from henceforth shall decide all pleas determinable at one day before any matter be arraigned, or plea commenced the day following, saving that their essoins shall be entered, judged and allowed, yet by reason thereof, let none presume to absent himself at the day to him limited.

Ibid. pl. 65.
cites 26 Aff.
5. Contrary,
that it is

[555]
not denied,
but that by
such re-
moval the
assise is discontinued.

5. Assise was brought in B. R. in Suffolk, and pending the assise the bank removed from Suffolk to Westminster, and yet they shall proceed in the assise, and awarded nisi prius to the justices of assise in Suffolk to try the issue, for * that which comes into B. R. shall not go out; quod nota. Br. Jurisdiction, pl. 62. cites 19 Aff. 4.

* S. P. Ibid. pl. 69. cites 29 Aff. 43. per Shard.

6. Nuisance was found by commission, and was certified by writ in B. R. and precept made against the tenants returnable sabbato post 15 Trin. which was out of the term. Skip. said we cannot make process out of the county where the bank sits unless by writ, and give day in the term and to the county, and Thorp concessit, and said, that they may receive indictments after the term, and make process sitting the bench, (and so see that the King's Bench may sit out of term) and so it was done, and he put to answer to it which was in this county, viz. Middlesex, and after they pleaded to issue, and verdict was taken in St. Clement's Church out of the place, and well, and they may take verdict by candle-light, and if they are to remove they may carry the jury with them in carts, if they cannot agree, and so may the justices of assise, Br. Jurisdiction, pl. 105. cites 19 Aff. 6.

7. At the commencement when the King's Bench sits in pairs, they shall make a proclamation that no fair nor market be held in the county so long as they sit, nor that any Court baron be held during their sessions, unless in writ of right, nor no county held, unless of exigents, and shall make proclamation of the assise of bread, ale, wine, and all other victuals, and per Shard, he who sells wine contrary to the assise of law shall forfeit the tunnel. Br. Jurisdiction, pl. 67. cites 27 Aff. 22.

As in assise
in the coun-
ty of Surry,
they were
at issue upon
Ne unques

8. When the King's Bench comes into a county, the assise shall be adjourned there, and this seems to be the reason, because no justices of assise are in the county where the King's Bench sits. Br. Jurisdiction, pl. 68.

Ne unques accouple in lawful matrimony, and certified for the plaintiff, and after the King's Bench came into the same county, so that all the assises were adjourned there, and the plaintiff came and set forth the record sub pede sigilli, and pleaded the plea upon all the record, and prayed the assise, and all came there by certiorari & mittimus &c. Br. Jurisdiction, pl. 68. cites 28 Aff. 59.

9. Note, that a precedent was shewn and read in Court, Trin. 2 H. 4 Rot. 2. one *M. L.* that was indicted in the county of Surry before the justices of peace, because that he feloniously entered the house of *J. S.* and feloniously stole 18d. Upon not guilty pleaded, the jury found a special verdict, that the said *M. L.* and one *J. D.* and *J. N.* de cognitione sua were common players at dice, and that they used to play with false dice, and cozen the king's liege people at play; and that they entered into the house of the said *J. S.* and desired him to play with them at dice, and with false dice they won of him 12d. ob. And if this be felony, they prayed the discretion of the Court. And this indictment and verdict was removed into the King's Bench, and thereupon judgment was entered, that although this was not an offence for which he should lose life or member, yet because it was found that he was a common cozenor of the king's people, it was ordered that he should be set upon the pillory three several days in the Strand, and three several days in Southwark, where the offence was committed. Note, that Noy shewed this precedent to the Court, and presently the roll was viewed and read; and Montague commanded a copy to be taken thereof, as a good precedent for the jurisdiction of the Court, and government of the commonwealth. Cro. J. 497, 498. pl. 4. Mich. 26 Jac. B. R. cites Trin. 2 H. 4. Leefer's Case.

10. Bill of præmunire was brought against *J. N.* in B. R. for the king, and he pleaded to the bill, because the statute is, that such suit shall be by bill before the king and his council by præmunire, which bill before the king and his council is intended before him and his lords, and not before him in his bench, and præmunire is intended by writ original, and not by bill in B. R. by which the plaintiff made bill of præmunire against him in custody of the marshall, and then he was compelled to answer. Br. Præmunire, pl. 1. cites 27 H. 6. 5. But in anno 22 H. 8. it was common that several clerks were compelled to answer to bills of præmunire in B. R. who were not in custody of the marshall, quod nota. [556]

11. *M.* and others were indicted of felony in the high way in C. B. for robbery of one *E. K.* with gags, and the indictment and the body were removed into B. R. and there arraigned, and pleaded not guilty, and tried; but afterwards a writ was sent with the body into the country with nisi prius, to try him in the county of B. Br. Corone pl. 230 (231) cites 5 Mar. Mannington's Case; and says, that this is the common course, so to remove the body, and the record out of B. R. into the country again.

the original record remains in B. R. and cites S. C.

9 Hale's Hist. Pl. C. 3. cap. 1. says that if issue be joined the transcript may be sent down to be tried by nisi prius, but

12. If a man be indicted of treason or felony in the county where the King's Bench doth sit, the venire facias for returning of the jury need not have 15 days between the teste and the return; nay, the entry may be *ideo immediate venit inde jurata &c.* But

9 Rep. 118. b. Trin. 10 Jac. in Lord Sanchar's Case

—Co. Litt. 134. b. S. P. if the indictment be taken in any other county, and removed into the King's Bench, there ought to be 15 days between the teste of the venire facias and the return. 2 Inst. 568, 3 cap. 1. S. P.

Br. oyer and determiner &c. pl. 8. cites 3 Mar. 1.

13. The justices of B. R. are the sovereign justices of gaol-delivery, and of oyer and terminer; resolved. 9 Rep. 118. b. Trin. 10 Jac. in *Ld. Sanchar's Case*.

4 Inst. 73. cap. 7. cites 7 E. 4. 18. 4 H. 7. 18. 14 H. 7. 21. — 2 Hale's Hist. Pl. C. 4. cap. 1. S. P.

14. One offered himself to be bail in an action upon the case before Justice Whitlock, and affirmed upon his oath he was a subsidy man, and assessed 41. in the subsidy book; but afterwards, upon further examination, he confessed he was not a subsidy man, and also confessed he had been bail in other actions, and had sworn he was a subsidy man, whereas he now confessed he was not. He was by the judgment of the Court committed to prison, and to stand upon the pillory, with a paper mentioning the cause, viz. for false bail. Cro. C. 146. pl. 25. Mich. 4 Car. Royson's Case.

15. S. having forged the hand of the chief justice to several bails, and being brought into Court, and examined, confessed the same. A record was instantly made of the confession, and judgment given to stand in the pillory several times, and to appear at the bar with a paper in his hat shewing his offence; and this without any information, but only on the record of his confession. Lev. 155. Hill. 16 & 17 Car. 2, B. R. Sherwood's Case.

[557] (L) The King's Bench Jurisdiction. Of what Actions they may hold Plea originally.

[1. **A**N action which is a common plea does not lie in banco regis. 17 Ed. 3. 50. b.]
Fitzh. Quare Incumbavit, pl. 1. cites S. C.

4 Inst. 71. cap. 7. says, that B. R. may hold [2. *As a quare impedit* does not lie in the King's Bench, because it is a common plea. 17 Ed. 3. 50. b.]

plea by writ out of the chancery of all trespasses done vi & armis, of replevins, of a quare impedit &c.
* Ibid. cites Trin. 19 E. 3. coram rege rot. 56. Linc.

Fitzh. [3. *So a quare incumbavit* does not lie in the King's Bench, because this is a common plea. 17 E. 3. 50.]
Quare Incumbavit, pl. 1. cites S. C.

* See (N) [4. An action upon the Statute of Winchester of robbery does not lie by original in banco regis. Mich. 37 Eliz. B. R. between
pl. 1. S. C. † Mar. 10,

teen * *Sadler and Morse* admitted, because it is a common plea; but Pasch. 15 Car. B. R. between *Sir John + Compton* and the hundred of *Woking*, in the county of Surry, admitted, and a trial and verdict thereupon at bar, and judgment accordingly, but no exception taken to it.]

11. pl. 28. S. C. but S. P. does not appear. — Noy 165. the Lord Compton's Case, seems

to be S. C. but S. P. does not appear.

[5. An action of *debt* lies in banco regis against a *sheriff* or *gaoler* in *custodia marescalli* for an escape, upon the Statute of *Westminster 2* and 1 R. 2. though the statutes limit the action to be brought by writ of debt, which is by original, for this is within the equity of the statutes, Mich. 7 Car. B. R. between *Brightwait and Taylor*, and others, sheriffs of Bristol, adjudged by a writ of error in Cam. Scacc. where the error was assigned, and there said, that there were many precedents accordingly.]

This Court hath power to hold plea by bill for debt, detinue, covenant, promise, and all other personal actions, ejectione firmæ, and

the like, against any that is in *custodia marescalli*, or any officer, minister, or clerk of the Court; and the reason hereof is, for if they should be sued in any other Court, they should have the privilege of this Court; and lest there should be a failure of justice, (which is so much abhorred in law) they shall be impleaded here by bill, though these actions be common pleas, and are not restrained by the said act of magna charta, ubi supra. Likewise the officers, ministers, and clerks of this Court, privileged by law in respect of their necessary attendance in Court, may implead others by bill in the actions aforesaid. 4 Inst. 71, 72.

[6. A bill in nature of a *præmunire* lies in banco regis in *custodia marescalli* &c. upon the Statute of *Ed. 3. cap.* though the statute be, that he shall have day containing the space of two months by garnishment, which implies, that it should be by original. 2 R. 3. 17. b.]

Fol. 587.

[7. An action upon the Statute of 2 H. 4. cap. 11. lies by bill in banco regis, for suing in the Court of Admiralty against the Statutes of 13 R. 2. and the said 2 H. 4. though the Statute of 2 H. 4. says, that he shall sue by writ super casum, Tr. 17 Car. B. R. between *Babb and Trelawny* adjudged. Intratur P. 17 Car. Rot. 137.]

Cro. C. 603. pl. 78. Ball v. Trelawny, it was objected, that the [558] suit was by bill, and

not by original writ, as the statute appoints; but in regard it was returned that he was in *custodia marescalli*, and that he could not otherwise have his remedy; it was held to be well enough.

8. An action by a common informer upon the Statute of 7 Ed. 6. cap. 5. for selling wines in his house against the statute, by which he forfeited 10l. for every time, may be brought in banco regis by bill of debt, though by the Statute of 18 El. cap. 5. it is enacted, That no person shall be permitted or received to sue against any person or persons upon any penal statute, but by way of information, or original action, and not otherwise; for by the Statute of the 7 Ed. 6. cap. 5. the penalty may be recovered by action of debt, bill, plaint, or information, in any of the king's Courts of record; and it was not the intent of the statute to oust the Court of King's Bench of jurisdiction against the statute of 7 E. 6. but this extends only to plaints in

Sty. 381. Hill. v. Dechair, S. C. and Roll said, that the constant course, is that the party being in *custodia marescalli* may be proceeded against by bill, and we will

not suffer this Court to be excluded by obscure words in the statute, and so judgment given for the plaintiff nisi &c.

in inferior Courts, and removed afterwards, and the words of the Statute of 18 El. are not by original writ, but by original action, and this bill of debt is an original action within the words. Tr. 1653. between Hill and Pierce de Chaier adjudged per Curiam, this matter being moved in arrest of judgment. Intratur P. 1653. Rot. 90. and it was said there were many precedents accordingly,

Cro. E. 76. pl. 36. Widow v. Clerk S. C. adjudged for the defendant, and it cannot be helped by the Statute 18 Eliz. for Jeofaile; for this is not matter of form, but substance, by misconceiving the action. — Mo. 247. pl. 39c. Udeson v. the Mayor of Nottingham, S. C. adjudged accordingly. — S. C. cited by the name of Woodson v. Clerk as adjudged, Mo. 418. pl. 665.

[9. If a mayor or sheriff, after an arrest, refuses sufficient bail, against the Statute of 23 H. 6. of sheriffs, by which the penalty of 40l. is given, one moiety to the king, and the other moiety to the party that will sue; in this case no action of debt lies by bill in banco regis, because the Statute of the 18 Eliz. is, That no person shall be permitted to sue upon any penal statute, but by way of information or original action, and not otherwise. But note, it is not limited by the Statute of 23 H. 6. how the penalty shall be recovered, but generally that he shall forfeit 40l. of which the king shall have one moiety, and he that will sue, the other moiety. Co. 3 Institutes 194. and Co. 6. 19. b. Gregory's Case, where it is cited. M. 29 & 30 El. coram rege, between Widiston and Clerk adjudged.

10. Bill of conspiracy was maintained in B. R. because the plaintiff was indicted of trespass; quod nota, as well as if it had been of felony; for he was thereof acquitted. Br. Bille, pl. 17. cites 3 Ass. 13.

11. Assise of Mortdancestor was brought in B. R. and no exception was taken but that it may well be brought, and assise of novel disseisin may well be brought there. Br. Jurisdiction, pl. 121. cites 30 Ass. 25.

12. Debt brought in B. R. for 16s. costs of suit given in an inferior Court upon a nonsuit upon the Statute of 23 H. 8. It was moved, that no action did lie, against the Statute of Gloucester, which is that no action shall be brought here for any sum under 40s. But since the costs are given by a latter statute, it was held clearly that they are recoverable by action of debt in B. R. and judgment for the plaintiff. Cro. E. 96. pl. 11. Pasch. 30 Eliz. B. R. Harward v. Furborne.

[559]
The chief justice of B. R. is the sovereign Coroner of all England; per the Reporter. 4 Rep. 57. b. — S. P. by Glyn Ch. J. 2 Sid. 101. Trin. 1668. — 2 Hale's Hist. Pl. C. 3. cap. 1. S. P.

13. The justices of B. R. are the sovereign coroners of England, and therefore where the sheriff and coroners of the land may receive appeals by bill, a fortiori the justices of B. R. may do it. 4 Inst. 73. cap. 7.

(M.) Of what Actions they may hold Plea for a collateral Respect.

[1. IF a man recovers in a *quare impedit in banco*, and after this is removed in *banco regis* by writ of error, *aquare incumbravit* does not lie there, though this does not lie without a judgment, because this is a new original, and a common plea in itself. 17 E. 3. 50. b.]

[2. An *action de valore maritagi* by the lord lies against the heir in *custodia marischalli*. Mich. 14 Car. B. R. between *Arundell and Saunders*, adjudged upon a demurrer to a declaration, but this was not moved; but Mr. Hoddesdon said to me, that he had divers precedents accordingly, that it lies in *banco regis*, intratur, H. 13 Car. Roll. 1266.]

Cro. C. 509, 503. pl. 3. S. C. but reports the action brought to be trespass upon the case, and it

was moved for the defendant, that the declaration was ill, it being in an action on the case, whereas it ought to be in *valore maritagi*; and the Court doubted of this point because there is a special original writ *de valore maritagi*.

[3. If a man sues a latitant out of B. R. to the intent to declare against the defendant, after arrest in *custodia marischalli*, in an action of debt, and the sheriff arrests him and suffers him to escape, an action lies against the sheriff, shewing this special matter, and he shall recover his damages, having regard to the loss of his debt. Tr. 14 Ja. B. R.]

In such case when the defendant appears and puts in bail, he is supposed to be in *custodia marischalli*,

and declares against him in *custodia* &c. but it is not so in any other Court. Cro. C. 330. in pl. 14. Mich. 9 Car. B. R.

[4. If after an arrest upon a latitant the defendant tenders amends after the arrest, for an involuntary trespass, according to the Statute 21 Jac. c. 16. this is not good, upon an averment that the latitant was sued out to the intent to declare in *custodia marischalli* for this trespass, for otherwise a man shall be defeated of his costs by such tender. Tr. 8 Car. B. R. between *Watts and Baker*, adjudged upon demurrer.]

Fol. 538.
Cro. C. 264. pl. 11. S. C. resolved, that the tender came too late, for as well as a

tender after an original writ comes too late, so it is after an arrest upon a latitant; for the tender by the statute is intended to be immediately after the trespass, and before any suit commenced.

5. In an action of trespass brought here against the defendant in *custodia marischalli*, in the declaration the trespass was laid to be done in Cornwall, the defendant pleads in abatement of this action, and sets forth the charter of E. 1. granted unto the Stannery Court, thereby enabling the stannery workers to plead there, and there to be impleaded in the Stannery Court, and therefore prays the benefit, and the privilege of this, to have the trial there; against this it was urged, that the Court here is to hold plea of this; notwithstanding their charter; for this Court may hold plea of debt, detinue and covenant, notwith-

So where B. killed W. within the Cinque Ports, and this was murder, D. the widow of W. did declare here against him in *custodia marischalli*,

the charter was pleaded, that he ought to be tried before the Constable of Dover, but this was not allowed; he was found guilty and hanged.

2 Bullst.

183. cites Mich. 40 & 41 Eliz. B. R. Rot. 284. Brayne's Case.

notwithstanding the statute of magna charta, cap. 11. communia placita non sequantur Curiam nostram &c. he being there in custodia mareschalli, the plaintiff may here declare against him in what manner he will, and his coming in here is not inquirable. But the Court agreed, that if one be here in custodia mareschalli, he is not to be fetched away, and if he should not answer here being in custodia mareschalli, none could have remedy against him. and therefore he was ordered to answer. 2 Bullst. 122, 123. Trin. 11 Jac. Parke v. Lock.

Carth. 108.
S. C. adjudged accordingly.
— 3 Salk. 369. pl. 1.
S. C. —
* Inst. 311.
S. P.

6. *Trespass quare vi & armis clausum fregit*, which the plaintiff laid to his damage of 20s. the defendant demurred for that B. R. hath not cognizance either at common law, or by the Statute of Gloucester, to hold plea in an action where the damages are laid to be under 40s. sed per Cur. trespass quare vi & armis will lie here, let the damages be what they will; and judgment for the plaintiff. 3 Mod. 275. Hill, 1 W. & M. in B. R. Lambert v. Thurston.

(N) In what *Actions* they may hold *Plea by Privilege*, for a collateral Respect. In respect of the Defendant.

* Cro. C. 211. pl. 3.
S. C. but I do not observe S. P. there —
Jo. 239. pl. 4. S. C. but S. P. does not appear.

+ See (L) pl. 4. S. C. — Gouldsb.

148. pl. 69. Hill. 43 Eliz. it was said to have been adjudged in B. R. that an action upon this statute against the inhabitants of an hundred will never lie by bill, but ought to be sued by writ, because the action is brought against inhabitants, which are a multitude, and consequently cannot be in custodia mareschalli, as another private person may be.

[1. **A**N action upon the Statute of Winchester, of robbery against the inhabitants of an hundred, lies by bill in B. R. though it is supposed by the bill that they are in custodia mareschalli &c. for the inhabitants of an hundred may be imprisoned, and it may be intended that they all were imprisoned. P. 7 Car. B. R. between * Hallier and the inhabitants of the hundred of Bemersb, alias Benhurst; in comitatu Berks defendants, adjudged upon a special verdict by admittance, this not being moved. Contra. 37 El. B. R. between † Sadler and Morse, adjudged.]

For more of the Court of King's Bench, See Crompt. Jurisdiction of Courts 67. b. to 82. — 4 Inst. 70, to 78. cap. 7. — Prynne's Animadv. on 4 Inst. 47 — 2 Hawk. Pl. C. 6, cap. 3.

(N. 2) The Court of Common Pleas.

* 1. *Magna Charta*. ENACTS that the *Common Pleas shall* * Before
 9 H. 3. cap. 11. † *not follow our Court, but shall be* this statute
holden in some place certain. C. B. might
 have been
 holden in

B. R. and all original writs returnable in the same bench, and because the Court was holden coram rege, and followed the King's Court, and removable at the king's will, the returns were ubicunque fuerimus &c. whereupon many discontinuances ensued, and great troubles of jurors, charges of parties, and delay of justice; for these causes this statute was made. 2 Inst. 21, 22.

† Here it is to be understood, a division of pleas for placita are divided into placita coronæ & communia placita; placita coronæ are otherwise, and aptly called criminalia or mortalia, & placita communia are aptly called civilia; placita coronæ are divided into high treason, misprision of treason, petit treason, felony &c. and to their accessories so called, because [561] they are contra coronam & dignitatem; and of these the Court of C. B. cannot hold plea. 2 Inst. 22.

Divers special cases are out of the statute. 1st. The king may sue any action for any common plea in B. R. for this general act does not extend to the king. 2dly. If any man be in custodia marshalli of B. R. any other may have an action of debt, covenant, or the like personal action by B. R. because he that is in custodia marshalli ought to have the privilege of that Court, and this act takes not away the privilege of any Court, because if he should be sued in any other Court, he should not, in respect of his privilege, answer there, and so it is of any officers, or ministers of that Court; the like law is of the Court of Chancery, and Exchequer. 3dly. Any action that is quare vi et armis where the king is to have a fine, may be purchased out of the chancery, returnable into B. R. as ejectione firmæ, trespass vi & armis, forcible entry and the like. 4thly. And a replevin may be removed into B. R. because the king is to have a fine, and so it is in an assize brought in the county where B. R. is. 5thly. Albeit originally B. R. be restrained by this act to hold plea of any real action &c. yet by a mean they may; as if a writ in a real action be by judgment abated in the Court of C. B. if this judgment in a writ of error be reversed in B. R. and the writ adjudged good, they shall proceed upon that writ in B. R. as the judges of the Court of C. B. should have done, which they do in default of others for necessity, least any party that has right should be without remedy, or that there should be a failure of justice, and therefore statutes are always so to be expounded, that there should be no failure of justice, but rather than that should fall out, that case (by construction) should be excepted out of the statute, whether the statute be in the negative or affirmative. 6thly. In a rediscussion or the like. 2 Inst. 23.

2. In *trespass* of fishing in his piscary in D. to the damage of 40^l. the others said, that he fished in S. in his several soil, absque hoc, that he is guilty of fishing in D. and the others e contra, and found for the plaintiff to the damage of 8^d. Forrescue said, the statute is, that the King's Court shall not hold plea under 40s. but of 40s. or above. Per Paston, this is true, as to the surmise of the plaintiff in his declaration. But if he declares of 40s. or more in debt, trespass &c. and it is found the damages 12^d. or the debt 12^d. or such like, yet the plaintiff shall recover, and so it was adjudged, and that the plaintiff should be amerced pro falso clamore, and yet contra if the plaintiff had counted of a sum under 40s. note the diversity. Br. Jurisdiction pl. 40. cites 19 H. 6. 8.

3. Justices of C. B. may hold plea by writ of escape in London upon recovery and execution in the Cinque Ports, and may write to the Constable of England, and to the Constable of Dover, and to the judges of the Admiralty, and to the bishop in case of bigamy, bastardy, profession &c. and that they themselves cannot hold plea thereof. And may write to the county palatine upon voucher,

voucher, and may write to the prince, and to the justices of Wales, quod nota. Br. Judges, pl. 30. cites 30 H. 6. 6.

4. Justices of C. B. hearing of menace and imprisonment made to an attorney of the Bank in inferiori palatio regis, may inquire thereof and set a fine. Br. Judges, pl. 31. cites 32 H. 6. 34.

Br. Respon-
der, pl. 83.
cites S. C.

5. In trespass the sheriff returned upon copias, that before the coming of this writ the defendant was taken and detained by warrant of the peace in pais upon riots and forcible entries, and for surety of the peace and by the justices of both benches, if the plaintiff counts, he shall be by mainprise after answer made, and remitted to the sheriff to answer there of the riots and peace, for C. B. cannot meddle with those, but of the peace in the same county, and so he was remitted before the sheriff in pais. Br. Return de Briefs, pl. 83. cites 2 H. 7. 2.

6. Note by the Statute of Gloucester cap. 8. *A man shall not have trespass in bank if he does not make oath that the goods taken were worth 40s. at the least*, which is also recited in a case of trespass, which was removed by a recordare out of a bafe Court where the damages were not 40s. and therefore ill, per Fitzherbert and the best opinion; and by the serjeants, procedendo shall be awarded quod non negatur, and it seems that the common law is, that a man shall not have debt, detinue, covenant nor sueb like in banco, unless it be of 40s. or more. Br. Jurisdiction, pl. 45. cites 14 H. 8. 15.

7. Note that Hill. 4 Mar. 1. it appears by searching the records of C. B. that the justices of the bank may take and record a recognizance as well out of term as in term, and as well in any county in England as at Westminster. And in the time of H. 5. Ann. 4. a recognizance was taken at Rippon in the county of York, 28 September, anno 4. H. 5. which is out of term. And several such records are in C. B. as well out of term as in term, and out of Court in the time of H. 4. H. 5. H. 6. and almost in all other reigns; quod nota, and see the entries of the three following, viz. M. 4 H. 5. Rot. 119. and H. 13 H. 6. Rot. 326. and P. 27 H. 6. Rot. 125. Br. Recognizance, pl. 20.

8. It is manifest that this Court began not after the making of this act, as some have thought; for in the next chapter, and divers others of this very great charter, mention is made de justiciariis nostris de banco, which all men know to be the justices of the Court of Common Pleas commonly called the Common Bench or the Bench, and Doct. & Stud. saith that is a Court created by custom. 2 Inst. 22, 23.

9. It appears by our books, that the Court of Common Pleas was in the reign of H. 1. that there was a Court of Common Pleas [in anno 1 H. 3. which was before this act, Martinus de Patteshull was by letters patents constituted Chief Justice of the Court of C. B. in the first year of H. 3. 2 Inst. 23.

10. It was resolved by all the judges in the Exchequer Chamber, that all the Courts viz. *B. R. C. B. the Exchequer and the Chancery*, are the King's Courts, and have been *time out of memory*, so that a man cannot know which is the most ancient. 2 Inst. 23.

11. A defendant having made an affidavit in *C. B.* afterwards being summoned confessed it to be false, whereupon the Court regarded his confession and ordered him into custody, and to stand in the pillory for perjury; and notwithstanding what was urged by his counsel as to the jurisdiction of *C. B.* he was put in the pillory the last day of the term. 8 Mod. 179. Trin. 9 Geo. 1. The King v. Thorowgood.

12. *This Court's authority is founded on original writs issuing out of chancery*, which are the king's mandates, for them to proceed to determine such and such causes; for it was a maxim among the Normans, that there should be no proceedings in *C. B.* without the king's writ; and therefore a writ always issued to warrant this Court's proceedings, and those issued out of chancery, because when the Courts were but one, the chancellor had the seal; therefore when they were divided he sealed all original writs by this method, and the seal was a check on the other Courts to know what cause was there, and likewise that the fines for having justice in the King's Court should be answered in Court, before there were any proceedings and therefore Fleta says *dum tamen warrantum * per breve regis habuerint cognoscendi, nam sine warranto jurisdictionem non habent neque coercionem*. Gilb. Hist. of *C. B.* 2.

* This is misprinted in Gilb. and should be as here. See Selden's Fleta 85. Lib. 2. cap. 34.

For more of the Court of Common Pleas, See Crompt. Jurisdiction of Courts, 91. to 102. Inst. 99. to 103. cap. 10.

(N. 3) Pleadings. As to Matters done in [563]
B. R. or C. B. or other Courts.

1. *B. R. and chancery are Courts removeable, and therefore it ought to be pleaded where they are held*. Arg. Mo. 176. pl. 310. and vouched 27 H. 6. 10. b. where in writ of maintenance in *B. R.* he did not shew where the bench was, and therefore ill; for the writs out of this bench are &c. *Ubi-cunque fuerimus in Anglia*; and in 5 E. 4. 3. b. the last case of the year the diversity is taken between the *C. B.* and *B. R.* on a bill exhibited in *C. B.* which did not shew where the bench was, and yet awarded good; for the statute of magna charta is that it shall be held in certo loco; and for this point he vouched 34 H. 6. and 36 H. 6.

2. In trover the defendant said that he recovered against the plaintiff, a debt of 20*l.* in *B. R.* and had a *fi. fa.* to the sheriff of *X.* who at *W.* in the county of *X.* seized the goods and delivered them.

Nov. 30. S. C. ad. judged.

them to him in satisfaction of his execution. But it was ruled to be ill because he *did not shew where B. R. was at the time of the recovery*, it being a Court removable at 5 E. 4. 8. is. Cro. E. 504. pl. 28. Mich. 38 & 39 Eliz. B. R. Thompson v. Clerke.

(O) Court of Exchequer.

* Prynn
Abr. of
Cotton's
Record. 418
* H. 4. No.
99. the
same peti-
tion, to
which the
answer was,

[i. **ROTULO** parliamenti, * 2 H. 4. numero 112. the *Commons petition against writs*, called *quia datum est nobis intelligi*, issuing out of the Exchequer, without any inquest found or other record, but no assent thereto, vide such petition against this writ † 4 H. 4. numero 78. simile, † 3 H. 5. numero 46.]

“The accustomed use shall continue.” But there are not so many numbers as 112:
† Ibid. 422. No. 78. † Ibid. 548. No. 46.

See Prynn's
Animad-
versions
54, 53.

2. *The Court of Exchequer*, which as Gervasius Tilburien-
ensis de Necefs. Scacc. Obs. (a sure author) reports, *was here
from the very Conquest, and instituted according to the pattern of
that in Normandy, and was erected there by Rollo, as Revile
faith, Notes on Grand Cust. fol. 8. The authority of this
Court was so great, that no man might contradict a sentence
pronounced here, and not only the law and the affairs concern-
ing all the great baronies of England, and all such estates as held
in capite were transacted here, but many laws and rights were
discussed, and many doubts determined, which frequently
arose from incident questions; for the excellent knowledge of
the Exchequer consists not in accounts only, but in multi-
plicity of judgments. And common-pleas were usually held in
this Court until the 28 of Ed. the 1st. it was enacted that no
common plea should be henceforth held in the Exchequer,
contrary to the form of the great charter. In this Court sat
the capital justiciary, the chancellor, treasurer, and as many of
the most discreet, greatest and knowing men (real barons) whether
of the clergy or laity as the king pleased to direct. The business*
[564] *of the Court was not only accounts and what belonged to them,
but to decree right, determine doubtful matters, which arose
upon incident questions, to hold common-pleas as before,
and to judge what chiefly concerned all capite lands, and the
great baronies of England. Brady's Preface to the Norman
History. 160, 161.*

3. *Information upon the Statute of 8 E. 4. cap. 2. for giving
licences; the question was, if the action lies in the Exchequer?*
The barons said this is a superior Court though not named
in the statute, and that the suit may be here, for there are no
restrictive words in the statute, and this Court hath power to
hold plea of any thing which doth concern the queen, if not
restrained;

restrained; adjournatur. Cro. E. 326. pl. 3. Pasch. 36 Eliz. B. R. Agard v. Candish.

4. On a *mandamus* to restore Dr. Patrick to the *Mastership of Queen's College in Cambridge* the Court were divided, whereupon it was considered *whether it being a cause of the crown side it might be adjourned into the Exchequer Chamber*, and it seemed to some that it might, but it was not. Lev. 65. Pasch. 14 Car. 2. B. R. Queen's College Case, alias Dr. Patrick's Case.

Sid. 346. pl. 12. Mich. 19 Car. 2. B. R. The King v. Patrick, the Court seemed that it might,

and that pleas of the crown as well as other pleas might be removed thither. And the book of 4 Inst. 68, 69. seems to warrant it; and that it extends to all pleas but those in the Ecclesiastical Court. Raym. 10. to 113. S. C. but S. P. does not appear. 2 Kcb. 259. pl. 5. S. C. says that upon motion to adjourn it into the Exchequer Chamber, because the Court were divided, the Court granted it.

5. In the Exchequer there are these 7 Courts. 1st. The Court of Pleas.

2dly. The Court of Accounts.

3dly. The Court of Receipt.

4thly. * The Court of the Exchequer Chamber, being the assembly of all judges of England for matters in law.

* Excepting in 2 cases, no case in law, can

be shewed to be adjourned into the Exchequer Chamber, before argument by the judges, in the same Court, where the cause is hanging, and these 2 were. The Case of the Postnati, Calvin's Case, 7 Rep. fol. 1. and the Case of Sutton's Hospital. 10 Rep. fol. 23. and no others before argument here, and difference in opinion by the judges, or agreement by the judges upon their differing in opinion, to adjourn the same thither, or by writ of error; per Coke Ch. J. who said these rules are to be observed, for the adjournment of cases of difficulty into the Exchequer Chamber. 1. This ought to proceed *ex motione curie*, but not of the party concerned. 2. This ought to be after argument, but not before and upon difference in their opinions, or by writ of error. 3. When the case is adjourned thither, if a judge dies, the matter, for this, is not to stay, but to proceed, and if one of the judges have there argued, and afterwards one of the other judges dies, the matter is not to stay, till another judge be made, but the same is to proceed, and a new judge being made he is not then to argue. 2 Bullst. 146, 147. Mich. 11 Jac. in Case of Waraine v. Smith.

5thly. The Court of Exchequer Chamber for errors in the Court of Exchequer. 31 E. 3. cap. 8. and 31 Eliz. cap. 1.

6thly. A Court in the Exchequer Chamber for errors in the King's Bench. 27 Eliz. cap. 8. 31 Eliz. cap. 1. Co. Pl. Intr. fo. 2. 24. 37.

And 7thly. This Court of Equity in the Exchequer Chamber. 4 Inst. 119.

6. King Charles the 2d. having taken up sums of money of the petitioners, (bankers) granted to them and their heirs, several annuities chargeable upon the hereditary revenue, of excise given to the king by 12 Car. 2. cap. 24. The barons held, that the remedy by petition to the barons was a proper remedy, and judgment was given for the petitioners by the opinion of 3, but Letchmere B. held that the king could not alien or charge this revenue, and that for several reasons there mentioned. Freem. Rep. 331. pl. 413. Hill. 1691. in Scacc. upon the petition of Hornbee & al.

[(P) Court of Exchequer.]

What Persons shall have the Privilege of Suit.

Br. Quo
Minus,
pl. 4. cites
S. C. —
Br. Juris-
diction,
pl. 70. cites S. C. —

[1. **T**HE king's farmer may sue one that detains from him part of the possessions that he hath from the king, out of which the farm is to be paid, by which he cannot pay his farm to the king. 38 Aff. 20. adjudged.]

Ibid. pl. 90. cites S. C.

S. C. cited
a Brownl.
36. in Case
of Guy v.
Reynell.

* An ac-
countant in
the Exche-
quer to the
king was
sued in
B. R. and a
baron of the
Exchequer
came into
the Court,
and pro-
duced his
book of
accountants
to the king,
and that

2. Thomas Younge justice sued bill in the Exchequer against the clerk of the Hanaper upon his account, and the defendant cast superseadeas of the privilege of the chancery, because he was clerk of the chancery; and by all the justices in the Exchequer Chamber the superseadeas shall not be allowed; for every one who is accountant ought to be attendant and present, and there he shall be sued, for it is an advantage to the king that he shall attend, and shall account; and accountant may have bill against his debtor, and this is for the king's advantage, quod citius solvat regi; and if accountant be sued in C. B. they shall send superseadeas to surcease; and if he be sued in B. R. those of the Exchequer shall shew the * record that he is accountant &c. and shall not have superseadeas to the king; for the pleas there are coram rege &c. and he shall be dismissed, and shall be sued in the Exchequer. Br. Privilege, pl. 25. cites 9 E. 4. 53.

the defendant was one, and prayed the privilege of the Court of Exchequer, and that the suit might be stayed. The Court demanded of the secondary, what the course was in such case, whether to grant it upon such bare averment of the baron, or that it ought to be pleaded and prayed by the party? Upon his informing the Court that it had been usually allowed without plea or prayer, it was granted accordingly. But Williams J. was strongly against it, and said, that there are many books wherein it was adjudged in point, that it ought to be upon the party's plea and prayer, and that without this the Court cannot certainly know whether he be the same party for whom the privilege is prayed. 2 Bull. 36. Mich. 10 Jac. Anon.

And if he
be implead-
ed in B. R.
those of the
Exchequer

will shew the record of account &c. For they cannot make superseadeas to the king; for there the pleas are held coram rege, and not coram justiciariis; and he shall be dismissed. Ibid.

One who was Receiver General of the revenues of the crown in the counties of W. and L. &c. being sued in C. B. brought a writ of privilege out of the Exchequer, but it was not allowed. D. 398. pl. 9. Mich. 15 & 16 Eliz. Hunt's Case.

The privi-
lege of suing
by quo mi-
nus in the
Exchequer
extends to
the debtor
of the king's debtor.

4. By the Statute of *Articuli super Chartas cap. 4.* it is provided, That no common-plea shall be held in the Exchequer, unless where either the plaintiff or the defendant is privileged. 5 Rep. 62. a. Mich. 32 & 33 Eliz. in the Exchequer, in Sparrie's Case.

4 Inst. 112. cap. 11.

5. The plaintiff being an accountant in the Court of Exchequer by bill there prayed to be relieved against a bond put in suit by defendant in the petty-bag, by reason of his privilege as Usher of the Chancery. The defendant pleaded his privilege as an officer of the Court of Chancery. The Court [566] agreed, that when *both parties are privileged, his privilege shall take place who sues first*; and that in this case the suit in equity to be relieved against the penalty of the bond is first attached here, and it is not the same suit with that at common law, but distinct from it. And it was further said, that *if both parties are privileged persons, and the attendance of the one is more requisite than of the other*, (as in the principal case it is, the plaintiff here being an accountant in this Court, and entered into his account, as by his bill is alledged, which cannot be compleated by deputy or attorney) in such case *his privilege shall be allowed who has most cause of privilege*; & adjournatur. But at another day the plea was over-ruled, and an injunction granted till answer. Hard. 117. pl. 2. Trin. 1658. Baker v. Lenthall.

6. The plaintiff, as debtor to the king, and *treasurer of the navy*, exhibited his bill in the Exchequer. The defendant pleaded his privilege, as *one of the Six Clerks in Chancery*, under the great seal. Hale Ch. B. and the Court held, that a general privilege, as debtor, will not hold against a special privilege, but against a general privilege in will. But a privilege as accountant will hold against a special privilege in another Court, as officer of the Court, or otherwise, though it be not alledged that he has entered upon his account; and in this case the plaintiff, being treasurer to the navy, is eo ipso an accountant. Hard. 316. Mich. 14 Car. 2. in the Exchequer, Sir Geo. Carteret v. Sir John Maffam.

7. There are *three sorts of privileges in the Exchequer*, 1st. As debtor. 2dly. As accountant. 3dly. As officer of the Court. Against the first of these, any man who hath a special privilege in another Court, as an officer of the Court, or an attorney, shall have his privilege, because the privilege of a man as debtor is only a general privilege; but if an accountant begin his suit here, no privilege shall be allowed elsewhere, because he has a special privilege, by reason of his attendance, to pass his account, in which the king hath a particular concern; the same holds in an officer of the Court; if he commences a suit here, no privilege in another Court shall prevail against him, because his attendance here is requisite, and his privilege here is attached first by commencing his suit; but where the accountant has finished his account, and reduced it to a certainty, so that it is become a debt, then he hath only a privilege as a general debtor has; so a *servant to an officer, or minister of the Court*, has no privilege against a privileged person elsewhere; per Cur. Hard. 365. Pasch. 16 Car. 2. in the Exchequer, Clapham v. Sir J. Lenthall.

(Q) [Court of Exchequer.]

Of what Things they shall have the Privilege of Suit.

Br. Jurisdiction, pl. 70. and Ibid. pl. 90. cites S. C. — Br. Quo Minus, pl. 4. cites S. C. —

[1.] IF the king's farmer sues in the Exchequer against a person for detaining of tithes, parcel of the possessions to him leased in farm by the king, though the right of tithes comes in debate between them, yet the Court shall not be ousted of jurisdiction. 38 Aff. 20. adjudged. * My Reports, said quod mirum.]

Br. Prerogative, pl. 74. cites S. C. but says it is said there, [viz. in the year-book.] quod mirum !

* This seems to intend his book of the book of assises, where are the words of quod mirum. [567]

Sav. 100. Anon. but S. C. accordingly. And per Cur. it may be

[2. If J. S. be parson inappropriate of D. and B. vicar there, and the king patron of the vicarage, and there is a debate between the parson and vicar for tithes, the suit in these tithes ought to be in the Exchequer. Hill. 8 Ja. Scaccario, per Curiam.]

commenced accordingly by English bill there, or by action in the office of pleas; for it is apparent that the king is supreme ordinary. This was Pasch. 9 Jac.

[3. 10 E. 1. Rotulo Clausarum Membrana 2 in Dorso Breve Thesaurario & Baronibus Scaccarii, quod non teneant Communia placita, nisi tangant Regem, vel Ministros Scaccarii, Statutum novum de Scaccario alitur dictum Statutum de Roteland, in magna charta, 2 part, fol. 66. nisi specialiter contingat nos vel ministros nostros.]

[4. 13. Ed. 1. Rotulo Clausarum Membrana 7 de debitis Regis in Scaccario atterminandis.]

Fol. 539.

[5. Among the ordinances of the 5 E. 2. 22. there is such ordinance, that no plea be in the Exchequer but such as touch the king, and his ministers of the said place, and their servants, who for the most part inhabit with them in the place where the Exchequer is held, and if any other be suffered to sue them, let the impleaded be aided by parliament.]

Lane 39. Anon. S. C.

[6. If a copyholder of the king's manor be sued in the Ecclesiastical Court for tithes, upon a suggestion in Scaccario, that he prescribes to pay a certain modus decimandi, he shall have a prohibition there, and this modus shall be tried there. Trin. 7 Ja. Scaccario, adjudged.]

Lane 55. Trin. 7 Jac. in the Exchequer, Anon. S. P. and seems to be S. C.

[7. If a man be amerced in the king's leet, and upon process out of the Exchequer the bailiff distrains him for the amercement, and he brings trespass, he ought to bring this action of trespass in the office of Pleas of the Exchequer, for the bailiff levied it as an officer of this Court. Pasch. 8 Jac. in Camera Scaccarii, per Curiam.]

Lane 98. S. C. accordingly.

[8. If an erroneous judgment be given in a formedon in a copy hold Court in the country where the king is lord, the party against whom the judgment is given may sue by bill or petition to the king

king in the Exchequer Chamber, in the nature of a writ of false judgment, for the reversal of this judgment; for as in the Court of a common person the proper suit for reversal thereof is to the lord by petition, so it is here to the king, and the Exchequer Chamber is the more proper to sue to the king by petition than the chancery, because it concerns the king's manor. Hill. 8 Jac. Scaccario, *Edwards's Case*.]

[9. An action of false imprisonment or other action, may be brought against the under-sheriff in the Exchequer, though the sheriff be the officer of the Court, for the Court takes notice of the under-sheriff also. Hill. 7 Jac. Scaccario, between *Doyley and Jolliffe*, adjudged per Curiam, and said that is the common course of the Court.]

that the sheriff is no such person as ought to be privileged here, and therefore the plaintiff should have his remedy elsewhere, and he said, that such a case had been reversed in the Exchequer Chamber; for the under-sheriff is but an attorney for a party privileged, that is, for the sheriff; but all the clerks of the Court and the other barons were against him in that, and also all the precedents.——2 Bullst. 80, B. R. S. C. but S. P. does not appear. — Brownl. 226. S. C. but S. P. does not appear.——Cro. J. 323. pl. 1. Trin. 11 Jac. B. R. S. C. but S. P. does not appear.

10. Statute of Rutland 10 E. 1. touching recovery of the king's debts, wills and ordains that *no plea shall be bolden or pleaded in the Exchequer, except it does specially concern us and our ministers of the Exchequer.*

the king for the better ordering this Court has been very much doubted. See Pl. C. 208. b. 209. a. 4 Inst. 113. cap. 11. where it is said to be an ordinance only. But 2 Inst. 551. upon that Statute of Articuli super Chartas 28 E. 1. cap. 4. Lord Coke says, that this was a statute, the title and stile of the act is Statutum Novum de Scaccario, aliter dictum, Statutum de Roteland. In Libro rubeo it is called Statutum de Roteland, and there is a register under the title of Brevia de Statut. Rex Thesaurario, & Baronibus Salutem, cum secundum Legem & Consuetudinem Regni nostri Communia Placita coram vobis ad Saccharum prædictum placitari non debent nisi Placita illa nos vel aliquem Ministrorum nostrorum ejusdem Scaccarij specialiter tangunt &c. which writ reciteth the words of the Statute of Roteland, and in the margin of the writ is quoted Statutum de Roteland, so as without question this act was made by authority of parliament and also whatsoever pleas were holden in the Exchequer, in the reign of H. 2. when Glanville wrote, yet now by two acts of parliament their jurisdiction is limited and settled; and therefore reject a late opinion contrary to such authority, and never read nor heard of before. 2 Inst. 551.——But Prynne's Animadversions 55, 56, 57. gives many reasons to prove that the Statute titled the Statute of Rutland is no statute.

11. Articuli super Chartas cap. 4. made 28 E. 1. enacts that *no common-plea be henceforth held in the Exchequer against the form of the great charter.*

of common-pleas between common persons in personal actions only. Where an officer or minister is one of the parties in any personal action, because that his absence in other Courts may hinder the affairs of the king in his Court of Exchequer. Any man that is a prisoner of this Court, or an accountant that is entered into his account, or any other that ought to have the like privilege of this Court of Exchequer, shall not be sued in any personal action but in this Court; and the reason is, because neither of these acts of parliament take away the privilege of any Court; for then, if the party privileged were sued in any other Court, he should not, in respect of his privilege of the Exchequer, answer there; and therefore lest the party should be without remedy, he may commence his action personal against him in the Exchequer; for statutes must be so expounded, as that there be no failure of justice. He that is a farmer, or indebted to the king, for the king's more speedy satisfaction of his debt or duty, shall sue his debtor by a quo minus in the Exchequer, and this appeareth by Britton, who treating of the jurisdiction of the Exchequer saith, Et que il eyt power a consuet de dett, que l'un doit a nous detters per ou nous puissions plus tost approcher a nostre. 2 Inst. 551.

12. *After the death of any debtor of the king process shall issue out against the executors the heir and tenants all together at one time by the course of the Exchequer.* Savil. 52, 53. per Fanshaw Remembrancer in pl. 111. Pasch. 25. Eliz. Anon.

13. There shall be *no suit* or proceedings according to the order of the Exchequer Chamber in cases of conscience upon any penal statute. 3 Le. 204. pl. 259. Trin. 30 Eliz. in the Exchequer. Anon.

14. *J. S. holds lands of the king by fealty and yearly rent, and makes a lease thereof to A. B. pretends that J. S. leased the same to him by a former lease; albeit there is a rent issuing out of these lands to the king, yet neither A. nor B. can sue in this Court by any privilege in respect of the rent, for that the king can have no prejudice or benefit thereby; for whether A. or B. do prevail, yet must the rent be paid; and if this were a good cause of privilege, all the lands in England holden of the king by rent &c. might be brought into this Court.* 4 Inst. 118. cap. 13.

15. *But if black acre be extended to the king for debt of A. as the land of A. and the king leaseth the same to B. for years, reserving a rent; C. pretends that A. had nothing in the land, but that he was seised thereof &c. this case is within the privilege of this Court, for if C. prevail the king loseth his rent.* 4 Inst. 118, 119. cap. 13.

16. *The king makes a lease to A. of black acre for years reserving a rent, and A. is possessed of a term for years in white acre, the king may distrain in white acre for his rent, yet A. hath no privilege for white acre, to bring it within the jurisdiction of this Court.* 4 Inst. 119. cap. 13.

[69] 17. *Upon a cross bill against a parson to discover what sort of tythes in particular he claims to be due to him; for that the parson in his bill one while demanded one manner of tything, and another while another, the Court held that in such a cross bill the plaintiffs need not entitle themselves to the jurisdiction of the Court, because the cross bill is grounded on another bill here in Court.* Hard. 160. Trin. 1659. pl. 2. in the Exchequer. Doble v. Portman.

18. *If a man be sued here in the office of pleas, he may have an English bill to be relieved against the plaintiff without setting forth matter of jurisdiction.* Hard. 160. Trin. 1659. pl. 2. in Scacc. Doble v. Portman.

19. *Whatever belongs to the jurisdiction of the Dutchy-Court may well be determined in the Court of Exchequer, notwithstanding that the Dutchy-Court is in being; per Cur.* Hard. 171. Trin. 12 Car. 2. in Scacc, Fleetwood v. Pool.

20. *H. was outlawed at the suit of B. and lands in his possession were extended, C. a third person, claimed a title to those lands, and brought an action of trespals and ejectment for them, and pleaded to the inquisition; it was ordered that the plea to the inquisition should be tried first, and that the ejectment should be*

he brought in this Court, because the king's revenue was concerned. Hard, 176. pl. 2. Hill, 12 & 13 Car. 2. Hammond's Case.

21. Upon an *ejectment* brought in C. B. by the defendant here, the plaintiff moved that the action might be laid here, because his title was under an extent out of this Court, for debts in aid. The Court ordered the parties to prosecute their suit here, because this could not appear but upon examination of the whole matter. Hard. 193. pl. 2. Trin. 13 Car. 2. in Scacc. Banks v. Bennet & al.

22. The commissioners of excise fined the plaintiff, being a brewer, according to the new act in 201, for not paying the duty of excise; and upon a return made that he had no goods, whereof a distress could be taken they imprisoned him; whereupon he brought an action of false imprisonment in the Court of B. R. and the defendants prayed the action might be laid here, because the cause concerns the king's revenue. Sed non allocatur per Curiam, because this fine does not immediately concern the revenue of excise, but is a penalty imposed for an offence committed in it; and it belongs no more to this Court than other like cases arising from fines and imprisonments; otherwise, if it had immediately concerned the king's revenue. Hard, 193. pl. 1. Trin. 13 Car. 2. in Scacc. Bishop v. Warner.

23. Court of Exchequer is a private Court; its proper jurisdiction concerns only the king's revenue and the king's officers. Per North. K. Vern. R. 221. Hill. 1683. E. of Newburgh v. Wren. Pl. C. 208. per Sanders, Ch. B. Stradling v. Morgan.

24. No errors in fact are examinable in the Exchequer Chamber. Per Holt Ch. J. Show. 171. Trin. 2 W. & M.

(Q. 2.) Disputes between the Courts of Exchequer and other Courts.

1. JURISDICTION of the Exchequer rejected for that one of the defendants had no privilege there. Cary's Rep. 96. cites 20 Eliz. East v. Bittenfon.

2. The plaintiff sued in chancery, to be relieved for a lease of 1000 years of certain lands, and depending the suit in chancery, the defendant, by quo minus out of the Exchequer, being tenant of the other lands to the queen, brought an *ejectment* against the under-tenants of the plaintiff; therefore an *injunction* to stay the suit of quo minus, if cause be not shewed, [570] Carey's Rep. 161. cites 21 Eliz. Jones v. Whitney.

3. No Exchequer man has privilege against a *subpœna*. S. P. Toth. 216. cites 3 Car. Tuke v. Clerk.

S. P. Toth. 216. cites 28 Eliz. Cutts v. Peters.

4. An officer of the Custom House being served with a *subpœna* to answer a bill, he refused and procured an *injunction* out of the Exchequer to stay the suit; but it was ordered that the plaintiff

An injunction out of the Exchequer disallowed.

lowed and the party which procured it, sent for by a purfui- vant, be- cause her majesty's

revenue was not in question here. Toth. 217. cites Hartopp v. Hartopp in 1594.

tiff should and might proceed in the suit, notwithstanding such injunction, and the party was committed for serving the same, the Court taking it to be a great derogation to their authority. N. Ch. R. 19. 8 Car. in Case of Vendall & al. v. Harvey, cites it as an order read by order of the Court as made by Lord C. Ellesmere.

5. A cause had been heard in the Exchequer where 2 *several* trials had been directed, viz. Will or no will, and a *verdict* was for the plaintiff in both; and yet the chief baron *dismissed the bill there but without prejudice in law or equity*. It was argued that those words (without prejudice in law or equity) must be understood not to hinder the plaintiff from seeking relief in any other Court of law or equity. And the Court conceived accordingly and ordered that plaintiff who had brought an *original bill in chancery for the same matters*, and to examine witnesses in order thereto in perpetuum rei memoriam, might *examine any witnesses not examined in the Exchequer*, and as to matters examined unto there, he might examine *the same witnesses de bene esse*, and how far those de bene esse should be used the Court would consider. Chan. Cases 155. Hill. 21 & 22 Car. 2. Anon.

6. A bill was exhibited in chancery, concerning tithes and bounds of a parish, which proceeded to answer and replication. Then he exhibited another bill in the Exchequer, and there witnesses were examined and now proceeds again in chancery, and replies. The defendant pleaded the proceedings and examination in the Exchequer, and ruled good as to examination of the same matters, which, being examined to there, were not examined in chancery. Chan. Cases 233. Trin. 26 Car. 2. The King v. Brownlow.

And Lord Keeper North said, that there are several precedents of injunctions from chancery to the Exchequer, where it has not kept within its proper bounds. So that the jurisdictions have by that means clashed. Ibid. 221. in S. C.

7. Mortgagor exhibits a bill to redeem in the Exchequer; the defendant there shall be at liberty to exhibit a bill to foreclose in chancery, and the pendency of a former suit is no plea, though it was insisted that this was only in nature of a cross bill to that in the Exchequer, which the now plaintiff might have exhibited there, and then one account of the profits would have served all, and it was vexatious in the plaintiff to bring the same matter in issue in another Court at the same time; and if the Deputy Remembrancer in the Exchequer should take the account one way, and a master here should take it another, it would breed confusion, and if this Court should be of an opinion, that there ought to be no redemption, and the Exchequer should decree a redemption, the jurisdictions would clash; and therefore, to avoid these inconveniences, priority of suit ought to give jurisdiction to the Exchequer. Lord-keeper declared his opinion to be, that in any case if the mortgagor exhibited a bill to redeem in the Exchequer, that the defendant there should be at liberty to exhibit a bill to foreclose in this Court; and over-ruled the plea, and ordered

dered the defendant to pay costs. Vern. 220. pl. 219. Hill, 1683. Earl of Newburg v. Wren.

8. *Assignees under a commission of bankruptcy bring a bill for an account against some persons who had seized the bankrupt's estate by virtue of 3 extents, one for the king, and the other two were extents in aid; bill dismissed, the matter being properly cognizable in the Court of Exchequer, which is the king's Court of revenue.* 2 Vern. 426. pl. 387. Pasch. 1701. Brown and Sandys v. Trant and Bridges & al. [574]

9. *Court of Chancery will not examine the quantum of the king's debt, nor how far extents sued out are necessary.* 2 Vern. 426. pl. 387. Pasch. 1701. on Case of Brown and Sandys v. Trant and Bridges & al.

(Q. 3) Pleadings of Privilege of the Court of Exchequer.

1. **A** Suit in chancery was against several defendants, *one of the defendants died, the survivors pleaded the privilege of the Exchequer.* But because the suit was joint at first against the deceased and others, and any thing appearing he had no privilege in the Exchequer, so that the Court of Chancery being lawfully possessed of the plea, his death ought not to give any more privilege to the other defendants to draw the cause from this Court than they should have had at the beginning, or while he lived; and therefore his lordship did adjudge the defendant's bill in this Court. 1 Chan. R. 69, 70, 9 Car. 1. Lake v. Philips.

For more of the Court of Exchequer, See Crompt. Jurisdctions of Courts, 105. to 112.—4 Inst. 103. to 117. Cap. 11.—Pryn's Animadversions on 4 Inst. 52, to 59.

(R) Courts. Dutchy.

[1. **I**F lands, parcel of the dutchy, lie within the county-palatine, Hob. 77. a suit in equity for this may be in the dutchy-court. pl. 101. Mich. 13 Jac. B. Holt's Case, per Warburton, to be the common practice in his time.] Owen v. Holt S. C. but S. P.

does not appear.

[2. But otherwise it is for lands held of the dutchy lying out of the county-palatine. Mich. 13 Jac. B. Holt's Case, per Warburton, to be common practice; for the jurisdiction is local, Hob. 77. pl. 101. Owen v. Holt, S. C. but S. P.]

does not appear.

[5. If

Hob. 77.
pl. 101:
Owen v.
Holt S. C.
& S. P. a
prohibition
was award-
ed because
the Dutchy

[3. If a man enters into an obligation concerning lands lying in the county-palatine, and he is sued upon this at common law, he cannot sue in equity in the Dutchy-Court, to be relieved against this bond, for the jurisdiction being local, it cannot be extended to this collateral matter. Mich. 13 Jac. B. Holt's Case, per Curiam.]

Court has no jurisdiction in respect of the person, as because the persons, who are suitors, dwell within the county palatine of Lancaster, nor upon the land of the subject any where, but upon the king's own lands and his own revenue, and perhaps for bonds and assurances given for his revenue of the dutchy: whereupon the plaintiff, finding the opinion of the Court, said he would surcease his suit there without writ, and so the Court compounded the cause. — S. C. cited 2 Lev. 24.

[572] 4. In regard of the land of the dutchy of Lancaster, the king is but as a common person. 2 Roll. 398. Rege Inconsulto (C) pl. 4. cites 11 H. 4. 85. b.

Chancery
may hold
plea of
lands with-
in the
dutchy;

5. The defendants inform, that the bill is exhibited for certain lands, parcel of the dutchy of Lancaster, and therefore ordered, that for so much it shall be dismissed. Cary's Rep. 139. cites 22 Eliz. Price v. Lloyd, Owen and Read.

per Lord Chancellor. Chan. Cases 278. Hill. 27 & 28 Car. 2. Brown v. Vermaden. — Hard. 171. Trin. 12 Car. 2. Fleetwood v. Pool, it was held by the Court in the Exchequer, that what ever belongs to the jurisdiction of the dutchy may well be determined in the Exchequer.

6. The Dutchy Court has no jurisdiction in respect of the person, as because the persons suitors dwell within the county palatine. Hob. 77. pl. 101. Owen v. Holt.

S. C. & S. P.
cited Vent.
136.

7. So it has no jurisdiction upon the lands of the subject any where, but only upon the king's own lands, and his own revenue, and perhaps on bonds and assurances given for his revenue of the dutchy. Hob. 77, 78. Owen v. Holt.

8. Suit in the Dutchy Court brought by the master of the hospital of Wigston, to avoid a lease made for 99 years, the plaintiff suggested for a prohibition, that the lands leased were not parcel of, nor within the dutchy; but the Dutchy Court pretended a jurisdiction, by virtue of a patent confirmed by the Statute 14. Eliz. the words of which patent were, That the Dutchy Court might make Ordinances for the Hospital, *quo modo se gererent, conversabuntur & eligerentur*, and the statute relates to this patent; but the Court held, that this does not give them power to hold plea of their possessions, but only to make ordinances for the government of the hospital, and not to determine the right of their possessions; and a prohibition was granted per tot. Cur. Roll. Rep. 42. Trin. 12 Jac. B. R. Sir Thomas Beaumont v. Hospital de Wigstone.

Toth. 145.
cites Mich.
5 & 6 Car.
in the
words fol-
lowing,

9. Dutchy lands granted from the crown may be debated and held plea of in chancery, and chancery granted injunction to stay proceedings in the Dutchy Court. Chan. Rep. 55. 7 Car. 1. Levington v. Wotton.

(viz.) Dutchy Court; where lands are granted of the crown in fee farm, reserving rent, they are pleadable and determinable in this Court. Hulse v. Daniel. — And cites Levington v. Wife, abate

about 8 Car. ——— And Hampden v. Ferrers, in 14 Car. ——— A decree in chancery after a decree in the dutchy, because it was ordered they had no jurisdiction, the lands being out of the dutchy, but held of East Greenwich. Toth. 182. cites 8 Car. Tenants of Barwick v. Caslar.

10. Court of Chancery not to be stayed by an *injunction* out of the dutchy. Toth. 182. cites 1633. Barnard v. Langley.

11. The question was, whether Dutchy Court of Westminster shall *bold plea by English bill* of lands of a county palatine? Hale and Twisden held it inconvenient to examine their power after so long continuance and practice, and so, and partly by admission of the parties, a prohibition was denied. 2 Lev. 24. Mich. 23 Car. 2. B. R. Fisher v. Patten, Vent. 155.
S. C. and
Prohibition
denied.
——— 2 Keb.
826. pl. 47.
S. C. and
prohibition
denied, per
tot. Cur.

12. An *appeal* by act of parliament lies to the Dutchy Court from the Court of equity at Lancaster. Vern. 443. a Nota at the end of pl. 417. Hill. 1686.

13. A *prohibition* was prayed to the Chancellor of the dutchy of Lancaster, to stay proceedings in a *suit before him in the chancery there, being a scire facias to repeal letters patents granted under the dutchy seal* and it was suggested, that the chancery there was only a Court of equity, and that they had not any common law proceedings in it, as in the case of the petty bag, and that the sci. fa. ought to have been returnable before the justices of Lancaster, neither could the chancellor there send a record to be tried at law; but after several arguments the Court *denied the prohibition, several instances being given of common law proceedings in that Court*, and the charter &c. creating such power to that Court, as was exercised at Chester, and there precedents of scire facias were shewn in point. The charter doth not tie up the jurisdiction to be either before the justices or the chancellor &c. Hill. 11 Ann. &c. and Trin. 12 Ann. B. R. the Queen versus Bailiffs and Burgessees of Liverpool. [573]

14. *Bill* was brought in the Dutchy Court for lands. The defendant demurred, because the plaintiff did not aver that the lands were within the dutchy, which is a circumscribed jurisdiction, and the demurrer held good. 9 Mod. 95. Pasch, 10 Geo. Lord Coningsby's Case.

For more of the Dutchy Court of Lancaster at Westminster, See Crompt. Jurisdiction of Courts, 134. to 137. and 4 Inst. 204. to 211. cap. 36.

(S) County Palatine.

{ Fol. 540.

To what Place the *jurisdiction* shall extend.
Durham.

Roll. Rep.
400. pl. 26.
the King v.
the Bishop
of Durham,

S. C. & S. P. and Doderidge J. said, that this appears by the Statute of Prerogative.—3 Bulst.
156. Mich. 13 Jac. S. C. & S. P. by Coke Ch. J.

[1. **THE** jurisdiction of the Bishop of Durham extends to
all places between Tyne and Tese. My Reports, 14 Jac.
the Bishoprick of Durham.]

Roll. Rep.
400. pl. 26.
S. C. & S. P.
—3 Bulst.

156, 157. S. C. the Court were clear of opinion, that the jurisdiction of the bishop extended
throughout the whole county, and judgment for the bishop.

[2. The jurisdiction extends *as well to the manors of other
men, as to the demesnes of the bishop.* My Reports, 14 Jac.]

3. In this county palatine there is a Court of Chancery
which is a mixed Court both of law and equity, as the chancery
at Westminster; herein it differed from the rest, that if an
erroneous judgment be given either in the chancery upon a
judgment there according to the common law, or before the
justices of the bishop, a writ of error shall be brought before the
bishop himself, and if he gives an erroneous judgment thereupon,
a writ of error shall be sued returnable in the King's Bench.
4 Inst. 38.

4. The Court of the county palatine is an original Court,
and reckoned in the number of superior Courts; Arg. Saund. 74.
Pasch. 19 Car. 2. in Case of Peacock v. Bell,

[574] 5. A superseadeas was granted to an *habeas corpus*, which
issued to remove a cause out of the city of Chester, which is a par-
ticular jurisdiction within the county palatine of Lancaster. The
parties were here at issue, and it appeared that neither of the
parties lived within the jurisdiction of the Court. If in a real
action above the lands appear to lie within a county palatine,
that will be ill; but if the action be transitory the Courts above
must be ousted by plea. There ought to be no *habeas corpus* but
upon an affidavit that the parties live out of the jurisdiction, but
in regard of former precedents a superseadeas was granted, the suit
having been well begun in the inferior Court. Mich. 11 Ann.
B, R. Page v. Leech.

Courts Pa-
latinate are
three, 1st,
Chester.
adly, Dur-
ham, erected
by Wil-
liam the

(S. 2) County Palatine. Antiquity and Power.

1. **C**OUNTIES Palatine were derived from the crown by
grant, as it seems; for in some case writ of the king
runs there; as where a man vouches here, and prays that the
vouchee may be summoned in the county palatine, process
shall

shall issue to the lord of the franchise to summon him. Br. Faux Conqueror. gaily, Lancaster, erected by act of Recovery, pl. 15. cites 36 H. 6. 32.

parliament in Edward the 3d's time. These were superior Courts within their jurisdiction, in as ample a manner as a Court of Westminster, and the king's ordinary writs do not run there. Gibb. Hist. of C. B. 153. 154.

2. Counties palatine were certain parcels of the kingdom assigned to some particular persons and their successors, with royal power therein to execute all laws established, in nature of a province holden of the imperial crown; and therefore the king's writ passed not within this precinct no more than in the marches. These were occasioned from the courage of the inhabitants, that stoutly defended their liberties against the usurping power of those greater kings, that endeavoured to have the dominion over the whole heptarchy, and not being easily overcome were admitted into composition of tributaries; and therefore are found *very ancient*, for Alfred put one of his judges to death for passing upon a malefactor for an offence done in a place where the king's writ passed not; and the same author reciting another example of his justice against another of his judges for putting one to death without precedent, renders the king's reason, for that the king and his commissioners ought to determine such cases, excepting those lords in whose precinct the king's writ passes not. Bacon of Government, 73. cap. 29.

3. Every earl palatine created by the King of England, is lord of an intire county, and has therein jura regalia; which jura regalia consists of 2 principal points, viz. in royal jurisdiction, and in royal seignior; by reason of his royal jurisdiction, he has all the high Courts and officers of justice which the king has; and by reason of his royal seignior, he has all the royal services and royal * escheats which the king has; and therefore this county is merely disjoined and severed from the crown, as is said in the Case of the Dutchy, Pl. C. 215. b. So that no writ of the king runs thither, unless a writ of error, which being the dernier resort and appeal is alone excepted out of all their charters, and cites 15 Eliz. D. 321. and 345. and 34 H. 6. 42. Dav. Rep. 62. a. Trin. 9 Jac. in the Exchequer, in the County Palatine of Wexford's Case.

4. It is informed that the parties dwell in the County Palatine of Lancaster, and the matter of the bill is for a supposed trespass in entering upon the defendant's lands, and consuming his grass and hay upon the same, which this Court doth not use to hold plea of, therefore ordered, if it be true, then the cause is dismissed, and the plaintiff to take his remedy in the County Palatine of Lancaster. Cary's Rep. 80. cites 19 Eliz. Hametheson v. Tounstall, Covell, Ridgmaden and Baldwin.

5. County Palatine of Lancaster was erected in full parliament in 50 E. 3. and was granted to his son John for his life; and

* Ibid. 69. a. says that this is to be intended of treasons, as were such at the time when the County Palatine was erected, and not of new treason made by act of parliament since, and cites 12 Eliz. D. [575] 288. b. 289. a.

jura regalia annexed to it. Per Treby Ch. J. 2 Lutw. 1235. cites 4 Inst. 204.

6. Their power was *king-like*, because they might pardon treasons, felonies, murders and outlawries on them, they might have made justices in eyre of assize, gaol delivery, and of the peace; all indictments and processes for treason and felony were in their names, but these *royalties were abridged* by 27 H. 8. 24. Per Treby Ch. J. 2 Lutw. 1235. cites 4 Inst. 204.

7. Before the Statute 27 H. 8. 24. the Bishop of Durham was as a king and might pardon all matters, and had *jura regalia*, but that statute took away part of it. Arg. 1 Bulst. 160. Trin. 9 Jac. in Case of Herne v. Lilburn.

8. Treasons, felonies and murders were *pardoned by the bishop*, he hath his judges, and they have their fees from him, and in writs of trespass the writ is of trespass done *contra pacem episcopi*, all this was so before the 27 H. 8. 24. Arg. 1 Bulst. 160. in Case of Herne v. Lilburn.

9. A *certiorari* to remove a record from Durham was denied by B. R. and said they had denied this before, and though they had power to do it, yet they would not in such a case oust them of their jurisdiction. Per Coke Ch. J. 2 Bulst. 158. Mich. 11 Jac. Anon.

10. County Palatine holds *tam libere per gladium prout rex coronam*, and so the Bishop of Chester doth his County Palatine. 2 Bulst. 227. Pasch. 12 Jac. Bowes v. The Bishop of Durham.

11. A County Palatine has *jura regalia* and therefore may prescribe to have *bona & catalla felonum*; per Coke Ch. J. and Doderidge; and so of *bona felonum de se*, per Coke. Roll. Rep. 399. pl. 26. Trin. 14 Jac. B. R. The King v. The Bishop of Durham.

So he shall have the goods of such as stand mute, and the bishop shall have these and goods of felons and traitors, as incidents to a County Palatine, and not be questioned for it in a quo warranto to shew his privileges. 2 Bulst. 226, 227. Pasch. 12 Jac. Boes v. the Bishop of Durham.

12. The County Palatine of Durham is not of late standing like that of Lancaster, but is *immemorial*, and a custom there is of great authority; per Curiam Mod. 173. Mich. 25 Car. 2. C. B. Anon.

13. The *style of the justices in Durham* is always *justices itinerant*, and there is no great sessions at all in the County Palatine, and therefore the act of 5 Eliz. cap. 25. which gives *the tales de circumstantibus* in Wales, and the Counties Palatine must be understood of such Courts in the Counties Palatine as answer to the grand sessions in Wales. 12 Mod. 181. Hill. 9 W. 3. Lamb v. Jennison.

(S. 3) Its Jurisdiction as to Person and Things.

1. IN maintainance it agreed per Hank. and Norton, that a County Palatine may hold plea of *maintenance*, notwithstanding that they had ancient jurisdiction; and action of maintenance is given by statute after-time of memory. Contra of vill which had consufance of pleas before the action given by statute, quære the diversity. Br. Cinque Ports. pl. 5. cites 14 H. 4. 20.

2. *Recovery here of land in the County Palatine* is not void but error. Quære. Br. Faux. Recov. pl. 15. cites 36 H. 6. 32.

3. The Bishop of Durham by ancient charter before the time of E. 3. *has the forfeitures for treason, and all felonies of his tenants between the rivers Tine and Tese in Northumberland.* See D. 288. b. 289. a. pl. 55. &c. Pasch. 12 Eliz. After Statute 26 H. 8. cap. 13. for Forfeitures for Treasons, A. makes a gift in tail of land held there of the bishop to B. B. commits treason, and is attainted of it; the bishop shall not have it; for such *forfeiture of intailed land was not in esse, when the said charter was granted, and the said tenant in tail is tenant to the donor and not to the bishop.* By all the judges of England. The Statute 25 E. 3. of treasons, does not take away the said grant to the bishop; it only declares what offences are treason. *The grant to the bishop does not extend to treasons enacted after the grants, nor to new forfeitures given to the crown after the grant.* Jenk. 237. pl. 16.

4. 5 Eliz. cap. 27. *All fines levied before the justices of the County Palatine of Durbam, authorized for that purpose, of tenements within the county which shall be read and proclaimed two days in the sessions, in presence of the justices of assise at Durbam, or one of them at the same sessions that the same shall be ingrossed, and at two general sessions next after, shall be of like force as fines levied with proclamations, before the justices of C. B. at Westminster.*

5. Where it appeared by a book heretofore presented to the queen's highness, under the hands of Dyer Ch. J. Weston J. and Harper J. of C. B. and Carus J. of B. R. and remaining (by force of her majesty's warrant) of record in the Court of Chancery, *touching the jurisdiction of the County Palatine of C. that before H. 3. all pleas of lands and tenements, and all other causes and contracts, and matters residing and growing within the said County Palatine of C. are pleadable, and ought to be pleaded and heard, and judicially determined within the said County Palatine of C. and not elsewhere out of the said County Palatine; and if any be heard, pleaded or judicially determined out of the same county, then the same is void, and coram non iudice, (except it be in case of error, foreign plea, or foreign voucher)* and also that no inhabitant within the said County Palatine

Palatine by the law, liberties and usages of the same, be called or compelled by any writ or process to appear, or answer any matter or cause out of the said County Palatine for any causes aforesaid, (as by the said book among other things more at large appears) and where now of late the plaintiff hath exhibited a bill of complaint in this honourable Court, for and concerning lands and tenements lying within the said County Palatine, and hath taken process against the said defendant in that behalf, who has thereupon appeared and by his counsel made request to this Court, that for the causes aforesaid the matter here exhibited against him might be from henceforth dismissed; wherefore forasmuch as W. S. has made oath that the said lands do lie within the said [577] County Palatine, and that the said defendant is inhabiting and dwelling within the said county; therefore the said cause is from henceforth dismissed, and remitted to the chamberlain of C. and other her majesty's ministers there, according to the tenor of the same book. Cary's Rep. 85, 86. 19 Eliz. Miles v. Brearton.

6. *Any dwelling there must appear upon the process, and plead their privilege*, by the Master of the Rolls's opinion. Toth. 218. cites Herenden's Case in 36 & 37 Eliz.

7. If the *defendants dwell out of the County Palatine*, he who has cause to complain in equity may also complain here in the chancery, for in regard that proceedings in chancery do bind the person only, if the person be out of the jurisdiction the Chamberlain of Chester cannot relieve the party, and therefore *ne curia regis deficeret in iustitia exhibenda*, the suit shall be in the chancery here, otherwise the subject may have right and no remedy, which would be inconvenient. 12 Rep. 113. Hill. 11 Jac. Earl of Derby's Case.

8. *Action of debt brought to be tried in Durham, and the record sent to the Chancellor of Durham, because the bishop's see was empty, and before the day given by the judges, a bishop was elected, and he sent the record and not the chancellor.* Brownl. 51. Trin. 15 Jac. Person v. Middleton.

N. Ch. R. 37. 14 Car. 1. Sherbourn v. Houghton. S. P.—As for things transitory, though they are within the County Palatine the plaintiff may alledge them to be done in any place within England, and defendant may not plead to the jurisdiction of the Court, that they were done within the County Palatine. 12 Rep. 113. cites D. 13. El. 202. and says, it was resolved upon the certificate of the Lord Dyer and other justices in the time of Queen Elizabeth.

9. Jurisdiction of the County Palatine is allowable between parties dwelling in the same county, and for * lands there, and for matters local, but disallowed where the bill in chancery was to have account of profits by a trustee of infant's lands, and of monies received on bonds, and for writings &c. but without costs. Chan. Cases 40. Hill. 14 Car. 2. Edgworth v. Davis.

It is ordered that upon affidavit made, that the *defendants dwell within the County Palatine of Chester*, and the cause of the bill is to be relieved of certain debts there, the cause is therefore dismissed into the said county. Cary's Rep. 116. cites 21 & 22 Eliz. Heyward v. Sherington.—N. Ch. R. 51. Moor v. Lady Somerset.—Fin. R. 452. Gerard v. Stanley.

* Cary's Rep 83, 84, 85, 86. Willoughby v. Brereton.

Where

Where the defendant lived in the County Palatine, and the lands lay there also, and a bill was brought for the same in chancery, it was for that reason dismissed. Toth. 144. cites 13 & 14 Eliz. Botely v. Savil.

10. *Ejectment* in B. R. of lands in the County Palatine of Lancaster; upon trial at the assises in Lancaster, the judge caused the possea to be marked, and to be moved in Court, whether it lies, the defendant being in custody; Et adjournatur. Raym. 81. Mich. 15 Car. 2. B. R. Long v. Emott.

11. It has been the constant practice time out of mind, that *witnesses dwelling out of the County Palatine have been examined by commission*, issuing out of the Court of Exchequer of Chester under the king's seal of the said County Palatine, and executed where the parties please, either in England or in foreign parts, for procuring their examinations. Fin. R. 452. Trin. 32 Car. 2. Davis v. Davis.

12. It was pleaded that *Chester* is an ancient County Palatine, time out of mind, and had royal franchises belonging to a County Palatine, which had always been allowed in law. And that all suits concerning lands, contracts, causes lying arising or growing within the said County Palatine, are determinable there, and not elsewhere, treason, error, foreign plea, and foreign voucher only excepted. And that the Court of Exchequer there hath been time out of mind a Chancery Court for the County Palatine, for the hearing and determining all matters and causes of equity arising in the said County Palatine; subject to an appeal of this Court, and that the now plaintiff and defendant at the time of exhibiting the said bill in the Court of Exchequer in Chester, and for several years before and after, were, and are inhabitants in the said County Palatine, and that the lands charged with the said 1500l. and all the matters whereon the said decree was grounded, did, and do lie, and are situate, and did arise within the said County Palatine. And that time out of mind it hath been the constant practice of the said Court of Exchequer, that *witnesses dwelling out of the said County Palatine have been examined by commission issuing out of the said Court of Exchequer under the king's seal of the said County Palatine, and executed where the parties please or desire, either in England or in foreign parts*, for procuring their examinations; and therefore demands the judgment of this Court, if by the justice thereof she is compellable to make answer to the said bill. The Court allowed the plea, and dismissed the bill with costs. Fin. R. 452. Trin. 32 Car. 2. Davis v. Davis.

Cary's Rep.
85. Wil-
loughby v.
Brereton.

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13. No appeal lies in chancery from a decree in the County Palatine, but if any appeal lies it must be to the king himself. Per North Keeper. Vern. 184. pl. 181. Trin. 1683. Jennet v. Bishop.

S. P. ruled
according-
ly. Ibid.
pl. 182. by
Lord K.
North, the
same day.
Partington
v. Tarback.

14. Bill of lands within the County Palatine was brought in chancery, and to entitle the Court of jurisdiction, suggested prior incumbrances to parties living out of jurisdiction, but no proof was of it, but it appearing that the proceedings in the County

County Palatine were unjust. North K. said, he would retain the cause and consider of it. Vern. 298. pl. 292. Hill. 1684. Hall v. Dowthwaite.

15. *Debt on a bond* against the defendant as executor, and in the margin of the declaration the county was written thus; *Chester-sh.* and the plaintiff declared upon a bond made by the defendant's testator, sealed and delivered apud Travin in Com. prædict. &c. The defendant pleaded plene administravit, and at a trial the plaintiff had a verdict and judgment; and now it was moved in arrest of judgment, that all the proceedings were coram non iudice, because it appeared upon the face of the record, that the bond was made at a place within the jurisdiction of the County Palatine of Chester, so that by the plaintiff's own shewing, this Court has no jurisdiction of this cause; adjudged by the Court, that the defendant had lost that advantage which he might have if he had not pleaded in chief, for he ought to have come in time and pleaded to the jurisdiction &c. but now he is foreclosed to say any thing against it, having admitted the jurisdiction by pleading in chief. Carth. 11, 12; Mich. 3 Jac. 2. B. R. Jennings v. Hankyn.

Davis v.
Speed. 8
Mod. 143.
S. C. ad-
judged for
the plaintiff;
and Holt
Ch. J. cited
the Case of
Jennings v.
Hawkins.

16. The jurisdiction of a County Palatine must be pleaded and demurring to the declaration is not sufficient, and where a defendant pleads to the jurisdiction of B. R. viz. that the cause of action did arise within the County Palatine, it must be averred in such plea, that either the defendant dwells in the County Palatine, or that he hath goods and chattles there sufficient by which he may be attached, otherwise the plea cannot be allowed least there be a failure of justice. Carth. 355. Trin. 7 W. 3. B. R. Davis v. Stringer.

17. County Palatine is a general Court for all the subjects of that Palatinate, and not merely for the causes arising within the Palatine; for if a debtor goes from the foreign into Palatine, his objections go along with him as much as if he went from one kingdom to another; and if it were otherwise a Palatinate jurisdiction would be a shelter and asylum to debtors; for no process but the supreme prerogative process runs there; and therefore it is duly determined, though the cause of action be out of the Palatinate; yet if the party be a subject of that Palatinate, as he is by coming into that dominion, that the action there may be brought against him. Gilb. Hist. of C. B. 153.

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(S. 4) Jurisdiction allowed or ousted. In what Cases.

1. **T**HE king shall have quare impedit of advowson in Durbom. Br. Cinque Ports, pl. 21. cites 5 E. 2. Quare Impedit 165.

2. *Assise*

2. *Affise in the county of Suffolk*; the tenant pleaded release, bearing date at Chester; and it was said, that at this day it shall be tried by the Statute of 9 E. 3. Br. Jurisdiction, pl. 104. cites 8 Aff. 27.

3. And by some, if a man in bank vouches in Chester, process shall issue here to warn him. Ibid.

4. And in dower it was pleaded, that the feme took dowerment of land in Durham, and the feme was compelled to answer. Ibid.

5. On a foreign voucher in Com. Chester of three, whereof two were to be summoned in Com. Chester, and the third in a foreign county, all shall be sent into C. B. and process made there as well to Chester as to the other county, and when the warranty is determined, all shall be remanded; quod nota. Br. Cinque Ports, and County Palatine, pl. 2. cites 49 E. 3. 9.

Br. Voucher
pl. 41. cites
S. C.—Br.
Jurisdiction
pl. 16. cites
S. C.

6. Debt, and counted upon lease of a benefice in Durham made for years in Middlesex; and the defendant demanded judgment if the Court would take consuance, because the benefice is in a County Palatine of D. ubi breve regis non currit, and the writ awarded good, by which the defendant pleaded levied by distress at D. Skrene said, all is in tithes, and no land in which a man may distrain; Prist. And the other averred, that he had land in demesne parcel of the benefice; and the others e contra. And per Hill, Hank. and Thirn. it shall be tried by the County Palatine, and remanded here; for per Hank. foreign plea in Durham shall be tried here, and remanded, and so we command the record to be tried there, and after to be remanded here; and Thirn. said, oftentimes we have sent to Lancaster to be tried there, where a thing is pleaded triable in the County Palatine. Br. Jurisdiction, pl. 25. cites 11 H. 4. 40.

7. Where an estate is made, and is general, as well within franchise as without, this shall bind County Palatine; per Hody. Br. Cinque Ports, pl. 17. cites 19 H. 6. 1 & 2.

8. If a man vouches foreign in Chester to warranty, or pleads foreign plea, the parol shall be removed; contra of sokemen, who are impleaded by bill where the franktenement is in the lord, and this seems to be copyholders. Br. Cinque Ports, pl. 1. cites 34 H. 6. 42.

9. If a man be surety that A. shall keep the peace, and he breaks the peace, and the other has land in Durham, the king shall send to the Bishop of Durham, or to his Chancellor, to make execution. Br. Cinque Ports, pl. 14. cites 1 E. 4. 10. by all the justices.

10. Outlawry in Durham or Chester shall not serve in bank; contra by Littleton J. of outlawry in Lancaster, for this is by parliament in the time of E. 3. and the others are by prescription. Br. Cinque Ports, pl. 15. cites 12 E. 4. 16.

11. Recovery in bank of land in Durham, Lancaster, or Chester, is void; contra of recovery here of land in the

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Cinque Ports, where no exception is thereof taken for law. Br. Cinque Ports, pl. 18. cites 9 H. 7. 12.

12. *Issue in B. R. triable in County Palatine of Lancaster, shall be tried by them of Lancaster, and remanded hither; per Brudenel and Tremaile J. for they said that this was parcel of the crown, and exempted afterwards. Br. Cinque Ports &c. pl. 10. cites 21 H. 7. 33.*

13. *If error be in Chester, and returned here, we shall award execution; per Fineux Ch. J. quod non negatur. Br. Cinque Ports, pl. 11. cites 21 H. 7. 35.*

14. *As to execution upon a statute staple in the County Palatine. Br. Cinque Ports, pl. 20. cites F. N. B. 132.*

15. *Chancery will in no wise retain a suit of lands which lie in the County Palatine of Chester. Toth. 181. cites 12 & 13 Eliz. fol. 399. Davenport v. Dean.*

16. *The plaintiff exhibited his bill as a privileged man to Sir Francis Kempe, Prothonotary of this Court, for lands lying in the County Palatine of Chester, and for that it appeareth by letters patents openly shewed in Court, under her majesty's great seal of England, that this Court by any privilege should not hold plea of any lands lying within the said County Palatine, it is therefore ordered to be dismissed, if the plaintiff shew not good cause. Cary's Rep. 155. cites 21 Eliz. Lomley v. Green & al.*

17. *It is ordered that if the plaintiffs do charge the defendants by their bill for the issues and profits of lands, which do lie in the county of Lancaster merely by way of account, then the defendants shall not be compelled to answer; if the defendants be charged in respect of their promise, then they are to answer. Cary's Rep. 162. cites 21 Eliz. Wingfield v. Fleetwood & al.*

18. *The Sheriff of Durham was sued before the counsel of York for an escape, and because this concerned his office of sheriff, and that he was an officer of the Bishop of Durham, and so the jurisdiction of the County Palatine impeached, a prohibition was granted; and per Whitlock and Bridgman when suits come into chancery, which concern the County Palatine of Durham and Chester, the lord chancellor will dismiss them. 2 Roll. Rep. 53. Mich. 16 Jac. B. R. Selby's Case.*

19. *Mandamus to the Mayor of Wigan in Lancashire, to restore an Alderman of Wigan to his place. The mayor returned, that they were a corporation in Lancashire, which is a County Palatine, and therefore were not compellable to answer in B. R. The mayor for this return was fined 100 marks, and it was said, that the Bishop of Durham had been fined 1000, for such another return. Sid. 92. pl. 14. Mich. 14 Car. 2. B. R. Wigan Mayor's Case.*

20. *A suggestion for a prohibition to the Chancery of Chester was, because a bill was preferred there before the*

Earl of Derby, Lord Chamberlain there, in which he set forth, that all the inhabitants of Cheshire have a privilege not to be sued elsewhere, and that the defendant in the prohibition knowing it, had notwithstanding *sued him in B. R. in trover* for a cloak &c. to which he appeared, and that the plaintiff in the action intended to proceed there against this privilege; but it was answered, that admitting they have such privilege, yet it *appears by his own bill that he has appeared here and pleaded, and so it is now too late* to claim his privilege, but that here no privilege is allowable to him; for though in trover for profit of land, or other action in which realty of the land may come in question, yet in action merely personal there shall be no such privilege. A prohibition was awarded, and the Court said, that in matters transitory it is in the plaintiff's election. Sid. 309. pl. 21. Mich. 18 Car. 2. B. R. Minshall v. Starkey. [581]

21. If one be a *prisoner in B. R.* against whom one has a cause of action arising within the County Palatine, so that his being a prisoner here, hinders that person from proceeding against him below; sure the causes arising within the County Palatine shall not hinder us from having consufance of it here, but that is where he is *first in custody of marshal for cause*, and another, or the same party, has another cause of action arising within the County Palatine; and if the truth were so, that the defendant was in custody of the marshal before, for a cause arising within our jurisdiction, the defendant instead of demurring ought to shew it in support of our jurisdiction. Per Holt Ch. J. 12 Mod. 535. Trin. 13 W. 3. Wilbraham v. Lownds.

22. But any plea of privilege is good to a declaration against one in custodia mareshalli, if he was *brought wrongfully there*; Per Holt Ch. J. 12 Mod. 535.

23. Plaintiff had a decree in the equity Court of the County Palatine of Lancaster, and defendant being now in the guards and living out of the jurisdiction, plaintiff brought this bill in aid of a former decree. Defendant by answer denied his knowing any thing of the decree, but admitted the proceeding there, and plaintiff now moved for injunction. But per lord chancellor injunction was denied, and said, he never knew a bill in this Court to aid jurisdiction in an inferior Court, and plaintiff's equity for injunction must appear upon proceedings here and upon records of this Court, and it being mentioned that plaintiff should have brought a certiorari bill, it was objected that *proceedings could not be removed out of County Palatine no more by a certiorari bill, than by writ of error at law, in case of action or judgment there.* MS. Rep. Trin. 1734. Duckingfield v. Nofworthy.

(S. 5) Proceedings and Pleadings.

See Adjournment (E) pl. 4, 5, 6, 7, and the notes there, and (F) per Totum.

Br. Jurisdiction, pl. 104. cites S. C.

Br. Jurisdiction, pl. 104. cites S. C.

Br. Jurisdiction, pl. 104. cites S. C.

1. **I**N assise in the county of Suffolk the tenant *pleaded release bearing date in Chester*. Herle said, to such deed a man need not answer where action is used upon such deed nor by defence as here. Br. Cinque Ports, pl. 19. cites 8 Aff. 27.

2. *And by some, if a man in this Court vouches in Chester*, process shall go from hence to Chester; for all is the power of the king. But see now *the Statute of 9 E. 3.* for such foreign trials. Br. Cinque Ports, pl. 19. cites 8 Aff. 27.

3. *And exchange for land in Durham* may be pleaded in bank. And the same per *Shard of land in Ireland*, and the party shall be compelled to answer to it. Br. Cinque Ports, pl. 19. cites 8 Aff. 27.

4. Where a *thing pleaded is in Bank triable in County Palatine*, the record shall be sent there to be tried, and after shall be sent back here; per Hank. and Culpeper. Br. Trials, pl. 27. cites 11 H. 4.

5. In special cases they may *award process to the County Palatine*. Br. Voucher pl. 151. cites 10 H. 6. 20.

6. *Trespass in Lancaster*, the defendant *pleaded release made in a foreign county*, by which the *day prefixed to the party's day in Bank 15 Pasch.* And this seems to be by equity of the statute of foreign voucher to try it in Bank. And per Newton it may come into chancery by certiorari, and be sent into Bank by mittimus at the suit of the party quod nota; for County Palatine cannot try a thing hors. And a man cannot commence the action elsewhere but in the County Palatine, but where consuance of pleas is, such foreign plea goes to the jurisdiction, and he shall commence this action at the common law, and this is a failure of right. Br. Trials, pl. 45. cites 22 H. 6. 48.

7. By *voucher or foreign plea in Chester*, the *parol shall be removed*. Br. Error, pl. 19. cites 34 H. 6. 42.

8. Parties were at *issue upon a thing triable in the County Palatine of Lancaster*. Per Brudnell, if a man *vouches in Lancaster*, the *justices write to them to try it, and remand it here*, and if they give *erroneous judgment writ of error lies here*. And *where judgment is given here we write to them to make execution there*. But if false judgment be given in Wales and Calais it cannot be reformed here; for those never were parcel of the crown, but the County Palatine was parcel of the crown, and after was exempted, and by the statute it ought to be tried where the writ is brought, and Tremasile concessit. Br. Trials, pl. 58. cites 21 H. 7. 33.

9. A writ was directed to the Justice of Chester, or his deputy, and this was to try a local issue. He who was then justice &c. made a return by the name of John Bradshaw, Chief Justice &c. Adjudged a good return, because the direction of this writ implies the superior, (in as much as it mentioned the deputy) and the Statute of H. 8. styles him the High Justice, and high and chief are all one, and this Court will not intend that there is any other justice than he who returned this writ. Sid. 64. Mich. 13 Car. 2. B. R. Barrows v. Huit.

Lev. 50. S. C. and it was a certiorari directed to the justice of Chester aut suo deputato, and after divers motions the Court held the

return good.——Keb. 165. pl. 180. and 187. pl. 168. S. C. mentions the mittimus to be directed only justificario of Chester, and certified by the chief justice, and the return held good; for the Court will not presume any other.

10. Upon a judgment in B. R. a testatum fieri facias issued to the Sheriff of Chester, who returned fieri feci, and that the goods remained in his hands for want of buyers; thereupon a venditioni exponas was awarded to him, of which he made no return, nor gave satisfaction to the plaintiff, who thereupon moved for an attachment. It was moved in the sheriff's behalf, that a fieri facias cannot issue out of this Court into a County Palatine; sed non allocatur; and an attachment was granted. Raym. 171. Mich. 20 Car. 2. Needham v. Bennett:

11. Indictment for forging and publishing a deed at Chester, was sent thither to be tried by mittimus, and was accordingly tried; and it was objected, that the mittimus was directed to the justices of assise at Chester, and not to the chamberlain, as it ought; sed non allocatur; and said, that so it is in writs of process, they are directed to the chamberlain, to command the sheriff to execute them, but not to command the judges to try the cause; for all the records to be tried are immediately sent to the judges in all Counties Palatine, and not to the chamberlain. 2 Lev. 111. Trin. 22 Car. 2. B. R. The King v. Newton.

12. In error to reverse a judgment in Durham in ejectment, it was urged, that per Cur. was omitted in the judgment. But it was answered and resolved, that ideo consideratum est, without saying per Cur. was good enough in the County Palatine Courts, which was looked upon in that respect as the Courts of Westminster, and so judgment was affirmed. 12 Mod. 181. Hill. 9 W. 3. Lamb v. Jenison.

(S. 6) Error. Of Writs of Error to the [583]
County Palatine.

1. **E**RROR in the County Palatine shall be redressed here in England; and per Newton, error in Wales shall be redressed before the justices errants there; but if there be no such justices there, it shall be redressed here in Curia Regis; quære inde; for per Fortescue and others, it shall be redressed in parliament, viz. Error in Wales. Br. Error, pl. 74. cites 19 H. 6. 12.

Br. Cinque Ports, pl. 8 cites S. C.

2. Upon error in Chester, *writ of error of common form*, as other writ of error is, shall be directed to the justice of Chester, returnable in B. R. and they shall have day in which three counties may be held to reverse or affirm it, and if they will reverse it the record shall not be sent into B. R. and if they will not reverse it the record shall come into B. R. and if it be reversed there be shall lose 100l. Br. Error, pl. 19, cites 34 H. 6. 42.

3. Error in County Palatine shall be reformed here. Contra of error in Calais or Wales; for those never were parcel of the crown. Contra of County Palatine; for it was parcel, and after was exempt; and per Fineux Ch. J. error in County Palatine shall be redressed there by commission, and not here. Br. Error, pl. 101, cites 21 H. 7. 33.

4. If error be in Chester, and it is reformed here in B. R. we will grant execution here; per Fineux Ch. J. quod non negatur. Br. Error, pl. 103, cites 21 H. 7. 35.

Jenk. 240.
pl. 22. S. P.

5. An erroneous judgment is given at Chester; a writ of error is brought out of the chancery at Westminster to reverse this judgment, and shall be directed *camerario cestræ sive ejus locum tenenti returnable in B. R.* 3 months after the delivery of it; the tenants there, called *judicatores terrarum*, have a month after the delivery of the writ of error there, to consider of the judgment, and to reform it if they see cause; if they do not reverse it, and the judgment is found erroneous upon this writ of error in B. R. as aforesaid, they forfeit 100l. to the king by the custom, there to be levied upon them; this affirmation or reversal of the said judgment extends only to errors upon the record, and not to error in fact. If they disaffirm or affirm the judgment, another *special writ* of error may be brought upon this in the King's Bench, if the party will. Often adjudged, Jenk. 71. pl. 34. cites Dy. 345.

Sid. 330.
pl. 12. S. G.
and judgment affirmed.—
2 Keb. 182.
pl. 9. Hic-
cocks v.
Bell, S. C.
adjournatur.
And Ibid.
226, pl. 82.
S. C. and
judgment
affirmed per
Cur. præter
Keeling.—
S. C. cited
Lev. 208.
that judgment was affirmed,
[584]
but mentions it as a

6. Error on a judgment in the County Palatine of Durham, wherein the plaintiff declared, *that the defendant was indebted to him apud civitat. Durham in 39l. for divers wares &c. to him sold and delivered.* Exception was taken to the declaration, because it was *not said* (ibidem) sold and delivered, and so it does not appear to be within the jurisdiction; for the goods might be delivered in another place out of the jurisdiction of the said Court. But it was answered, that though this is a good exception to a declaration in inferior Courts, yet the County Palatine Court is an original, and reckoned among the number of superior Courts, as in the Statute 3 Jac. cap. 8. executions in Counties Palatines, in certain cases there specified, shall not be stayed by writ of error without security &c. and they never certify their jurisdiction upon a writ of error, no more than the Court of Common Pleas, because the Court here judicially takes notice of their jurisdiction, and the entry of their judgments there, is like the entry of the judgments in those superior Courts, for it is *ideo consideratum est generally*, (without saying per Curiam) therefore

therefore this being a superior Court, and the rule is, that nothing shall be intended to be out of the jurisdiction of superior Courts, except what particularly appears to be so, whereupon the judgment was affirmed. The Court at first were divided, Windham and Morton held the declaration good, but Keeling Ch. J. and Twisden *e contra*; but afterwards Twisden said he had advised with the other judges, who were all of opinion, that the County Palatine was an original superior Court, and therefore the declaration good; wherefore the judgment was affirmed by Twisden, Windham, and Morton, Keeling remaining in his former opinion, Saund. 73. Pasch. 19 Car. 2. Peacock v. Bell.

Cafe in the
Royal Franchi-
se of Ely,

7. It was moved to stay the return of a Writ of *error out of the chancery, to reverse an outlawry in the County Palatine of Chester*, according to the opinion of the Lord Coke, 4 Inst. 214. sed non allocatur; because this old usage is gone by the Statutes 32 H. 8. cap. 13. and 33 H. 8. cap. 13. before which last statutes there was no outlawries in Chester, for coroners are introduced there by that statute, and they had no chief justice there till Queen Elizabeth's time, for till then, there being but one, there could be no chief. 2 Salk. 500, Trin, 12 W. 3. B. R. Wilbraham v. Poley,

For more of County Palatines, See Crompt. Jurisdiction, 137, to 142.—4 Inst. 211. to 216. cap. 37. of the County Palatine of Chester. And Ibid. 216. to 220. cap. 38. of the County Palatine of Durham.—Prynne's Animadversions &c. on 4 Inst. 151, 152.

(S. 7) Ely.

Royal Franchise of Ely.

1. *IN error of a judgment in Ely Court, and assigned, that in the stile of the Court it is not set forth, whether it be held by charter or prescription.* 2dly, *That the judgment is considered, without saying per Curiam,* 3dly, *The writ of enquiry is per Sacramentum duodecim, without saying proborum & legalium hominum;* but all these exceptions were over-ruled, because it being a royal franchise, it is not as in case of other inferior Courts. Lev. 208. Pasch. 19 Car. 2. B. R. Pigge v. Gardiner.

2. *Error of a judgment in Ely Court in assumpsit was assigned, that it is not said, that the goods for which the action was brought were sold and delivered within the jurisdiction of the Court;* but judgment was affirmed; because it is not as in the case of other inferior Courts. Lev. 208, in Case of Pigg v. Gardiner, cites it as Pasch, 19 Car. 2. B. R. Peacock v. Bell,

3. *Ely is not a County Palatine, but only a Royal Franchise, and therefore the defendant cannot plead to the jurisdiction of this Court, viz. that the lands &c. or the cause of action are, or did arise in Ely, for that is only particular to a County Palatine, which Ely is not; for the Bishop of Ely can only demand cognizance of Pleas, which is all the franchise he hath as to this purpose; and such are the franchises of the Cinque Ports, which are the same with this of Ely; and it is usual for appeals of murder to be brought in this Court, when the fact was committed in either of these franchises, and the trials here concerning lands in Ely are good; but it is not so where lands lie in a County Palatine.* Carth. 109. Hill. 2 W. & M. in B.^rR. Cotton v. Johnson.

[585]

* This Court and all jurisdictions belonging or exercised in the same, is taken away by the Stat.

(T) The Court of the Council of York, and the * Marches.

[1. **THEY** shall not hold plea upon a penal statute. Mich. 12 Jac. B. per Coke said to be resolved.]

1 W. & M. Stat. 1. cap. 27. § 2. — See Tit. Marches of Wales (A).

[2. They shall not hold plea upon a replevin, because none shall hold plea of a replevin without writ, for the sheriff could not without writ before the Statute of Marlebridge, cap. 21. Mich. 7 Jac. B. per Coke.]

Bull. 110. Pasch. 9 Jac. Baker v. Dickenson S. P. and a prohibition was granted.

[3. The Council of York cannot hold plea of a *plaint in nature of a detinue vi & armis*, though detinues are expressly within their instructions, *because this is in nature of a trespass.* Mich. 7 Jac. B. between Curtiſ and Cooke, resolved, and a prohibition granted.]

[4. If a man, having *bona notabilia* in several dioceses, makes an *indenture* his executor, and dies, and *administration durante minore ætate* is granted to B. in the Prerogative Court, and he is bound by obligation to render a true account; if B. be after compelled in the Court of Marches in Wales, to give bond to render an account there, a prohibition lies, because they there have no authority to question any thing that belongs to the Court Christian, if it be not for adultery. Pasch. 17 Jac. B. Drinkwater's Bill.]

Mo. 874. pl. 1220. S. C. adjudged, and also because it is against the liberty

[5. The obligee cannot sue upon an obligation * in English [by English Bill] before the Council of York, though it be within their instructions, for the king cannot alter the law without parliament, and there cannot be such a suit in chancery, and by this the king should lose his fine; ergo. Mich. 10 Jac. B. per

B. per Curiam, between *Guy and Sedgwick*, and the Bishop of York.] of the subject, who peradventure ought

to have error or attain. — Godb. 201. pl. 287. the Archbishop of York v. Sedgwick. S. C. adjudged accordingly.

* The original is, (en English) but both Mo. and Godb. are (by English bill)

[6. If the Council of York or Wales *begin with a sequestration*, a prohibition lies, for a sequestration is *not to be granted there till a contempt*. Hill. 22 Jac. B. R. *Vagbans's Case*, prohibition granted to York.]

[7. An *information cannot be preferred* in the Marches of Wales, *against any man that is not within the jurisdiction of the Court*, to compel him to answer to it. Hill. 11 Car. B. R. in one *Foster's Case*, per Curiam.]

[8. If a man *sues* in the Marches of Wales *by English bill* in an action upon the *case of 50l.* (as he may by the instructions there) *upon a promise*, and the *defendant pleads the Statute of Limitations*, and this is *over-ruled*, and thereupon the *50l. is decreed against the defendant*, without awarding any commission in nature of a writ of inquiry of damages, a prohibition lies, for this is but an action upon the case by English bill. Mich. 14 Car. B. R. between *Hancock and Mervin*, per Curiam, a prohibition granted. Intratur, Trin, 14 Car. Rot. 392.] [586]

As to the Court of the President and council in the dominion and Principality of Wales, and the Marches of the same. See 4 Inst. 242. &c. cap. 48.

As to the President and Council of York. See 4 Inst. 245. cap. 49. and 13 Rep. 30. &c.

(U.) Court Leet. *What [it is, and other Matters concerning it.]*

Fol. 541.

[1. **A** Court Leet is the *most ancient Court of the land*. * 7 H. 6. 12. b. 9 H. 6. 44. b.] * Br. Leet. pl. 14. cites S. C.

& S. P. by Cottelmeere.

[2. The *sheriff's turn is not any Court Leet*. * 18. H. 13. Fitzh. Leet. pl. 1. cites S. C. & S. P. b. Curia. Contra, 25 H. 8. 69.]

per tot. Cur. for in a leet they have consuance of bread &c. which they have not in the tourn of the sheriff.

[3. If a man *both a great leet within his seigniori, another cannot have a small leet within the pursuit, [precinct] of a manor which is within the same seigniori*. 18 H. 6. 13. b. Curia.] Fitzh. Leet. pl. 1. cites S. C. & S. P. because a man shall

not be obliged to come to 2 leets by reason of his reiance. — The Earl of N. had a leet it T. of all

all the residents in T. D. &c. and the Earl of D. had a leet in every of these villa &c. and at the holding of the Grand Leet, every one of the inferior leets send a constable and four men who present in the Grand Leet all matters presentable in leets of things done within the respective leets, and this had been the custom time out of mind. If the constable and four men of any of the villa do not attend, the villa shall be amerced, but no more of the inhabitants are obliged to attend. And in every there ought to be made a special prescription, and not a general one as appears 8 [18] H. 6. 13. 13 E. 3. Leet 7. 11 H. 3. Title Issue. 40. per tot. Cur. Cro. J. 583, 584. pl. 4. Mich. 28 Jac. B. R. Cook v. Stubbs.

6 Rep. 19.
a. that the
steward is
judge in

[4. The steward is judge in this, and not the suitors. Co.
6. Gentleman 12. Contra 17 H. 6. 13.]

the leet, and the sheriff is the tourn, cites 10 H. 6. 7. 7 H. 6. 12. 12 H. 7. 19. — Br. Leet, pl. 14. cites 7 H. 6. 12. that the steward is judge in the leet and may affix a fine, per Couchmere; and by Pafion, so far as his power extends he has equal power with the justices, to which Newton agreed. — [Roll seems to be misprinted both as to the (contra) and the year; for in year book is no such year, as (17) and Mich. 7 H. 6. 12. b. 13. a. pl. 17. has the S. P. as above.] — 8 Rep. 38. b. Trin. 30 Eliz. C. B. in Griesley's Case, resolved, per tot. Cur. that the steward is judge.

[5. If a man be elected in a Court leet to be a constable within the jurisdiction of the leet, and before he is sworn, the justices of peace at their sessions discharge him, because he is a master of arts, or for other cause, and elect and swear another to be constable [587] there; upon a complaint of this to the Court of King's Bench, the Court of King's Bench may grant a writ to discharge a last man, and to swear him that was elected at the leet, because the election of the constable belongs properly to the leet, without a reasonable cause to the contrary. Hill, 10 Car. B. R. Herjon's Case, who was elected in the leet of the Bishop of Winton, in Waltham-Welbeck in comitatu Southampton, and the writ granted accordingly.]

[6. Tr. 6 Car. B. R. Arundel's Case of Dorsetshire, a like writ granted also.]

7. The leet was derived out of the turn of the sheriff; per Fineux. Br. Leet, pl. 24. cites 2 H. 7. 15.

A leet is not
incident to a
hundred,
but it may
be append-
ant to it;

8. A leet may be within a hundred or belonging to an hundred; it may be parcel of an hundred, Arg. Cart. 177. cites 8 H. 7. 1. 12 H. 7. 15. 2 H. 4. 24.

per Keble, Rede and Fineux. Br. Leet pl. 24. cites 2 H. 7. 15. — Ibid. pl. 23. cites 8 H. 7. 1. S. P. by the opinion of six justices against three.

9. Of ancient time the sheriff had two great Courts, viz. the Tourn, and the county Court; afterwards for the ease of the people, and especially for the husbandman, that each of them might the better follow their business in their several degrees, this Court here spoken of, viz. *View of frank-pledge, or leet, was by the king divided, and derived from the tourn; and granted to the lords to have the view of the tenants and residents within their manors &c. So as the tenants, and residents, should have the same justice, that they had before in the tourn, done unto them at their own doors, without any charge or loss of time, and for that cause came the duty in many leets to the lord de certo leet, towards the charge of obtaining the grant of the said leet,*

leet. So, likewise, and for the same reason, *were hundreds, and hundred Courts divided and derived from the county Courts*, and this the king might do, for the Tourn and Leet both are the king's Courts of record; and as the king may grant a man to have power tenere placita within a certain precinct, &c. before certain judges, and in a manner exempt it from the jurisdiction of his higher Courts of Justice, so might he do in case of the tourn, and hundred Courts, so as the Courts and judges may be changed, but the laws and customs, whereby the Courts proceed, cannot be altered. And as the county Court, and hundred Court are of one jurisdiction, so the tourn and leet be also of one and the same jurisdiction; for *derivativa potestas est ejusdem jurisdictionis cum primitiva.* 2 Inst. 71.

10. Court leet may be *divided*, as where the manor of D. extends into A. B. and C. by a grant of totum manerium suum de D. in B. there being a Court Leet in D. the grantee may keep a Court Leet in B. Sic dictum fuit. Cro. E. 39. pl. 1. Pasch. 27 Eliz. C. B. in Case of Morris v. Smith and Paget. But see tit. Manor (G).

11. Every leet is the *king's Court* though another has the profit or commodity of it. Arg. 4 Le. 105. pl. 215. Mich. 29 Eliz. B. R. Anon. A leet is the Court of the king. 2 Inst. 143. A Leet was

once one of the greatest Courts the king had, which was constituted by the Monarch of the Saxons, but now is but the shadow of it. Per Doderidge. J. Roll. R. 73. pl. 16. Mich. 12 Jac. B. R. in Case of Bullen v. Godfrey.

12. Two leets cannot be *in one place infimul.* Mo. 427. pl. 595. Hill. 38 Eliz. Lord Norris v. Barret.

13. Agreed, that the lord of the manor and leet is to *provide Stocks* as well as tumbrel, and if he does not, he forfeits his liberty for his negligence. Mo. 574. pl. 789. Trin. 40 Eliz. in Case of Strogs v. Stevenson.—But see Cart. 29. that the *Stocks* are to be at the charge of the town, and it is a forfeiture of 5l. if a town has none. Cro. E. 698 pl. 11. Scoverson v. Strogs. [588] S. C. held that pillory and tumbrel ought to be

provided by the lord of the liberty and not by the vill, unless there be a prescription to the contrary, which ought to be specially alledged; for they being for execution of justice within the liberty, he ought to see it to be done.

14. The king has power to make and *create* a leet anew, where none was before. A *distress* is incident of right, but in a Court Baron a *prescription* must be laid to distress. Brownl. 36. Anon.

15. *Private leets* as to this purpose are within the leet of the hundred, to inquire of things omitted by them to be inquired being public *nuisances*. Cro. J. 551. pl. 13. Mich. 17 Jac. B. R. Loader v. Samuel. S. P. Contra. But in such case a writ may be directed to the sheriff to in-

quire thereof, and by the book of 29 E. 3. this writ is not taken away by the Statute 28 E. 3. 9. made the year before, which was then fresh in the judge's memory. 4 Inst. 261.

16. The *Grand Leet* is called *Turn*, and is in nature of the sheriff's turn which has jurisdiction of all inferior leets within it. Cro. J. 584. pl. 4. Mich. 18 Jac. B. R. Cook v. Stubbs.

* Jo. 283. S. P.—A man cannot be attendant at two leets, if they be held at several days; per Cur. Hct. 21. Trin. 3 Cat. C. B. in Case of Eve v. Wright.

18. When a *hundred leet* is granted to a *subject* it is a *franchise*; per Hale Ch. J. Freem. Rep. 349. in pl. 433. Mich. 1673.

19. In the hundred of Norton Ferris there is an ancient borough called Wincaunton, which has a leet, and there was also a leet in the hundred. Here *though there be a leet in the hundred*, which cannot be but by prescription, yet *there may be a subordinate leet within it, and the residents of this leet may be exempt from their attendance at the leet of the hundred, unless the hundred by prescription claim it.* But Hale Ch. J. said, there is a *difference between a leet in an ancient borough, (who in eyre appeared by four, and was always looked upon distinct from the hundred,) and between leets in upland towns, where he that owes suit to the leet may owe none to the hundred, but by custom he may do so.* But the chusing of constables and other officers for the hundred out of the leet of Wincaunton, may be out of the leet. 3 Keb. 197. pl. 44. and 230, 231. pl. 47. Mich. 25 Car. 2. B. R. the King v. King.

In all leets they only say, ad Cur. &c. tent. such a day

without shewing their authority. But it had been a good objection not to shew authority if constant practice had not been otherwise. 12 Mod. 4. S. C. Pasch. 3 W. & M.

20. In a *presentment* in a leet it is not necessary to shew *coment* nor *quo jure*, the Court is held. 1 Salk. 200. the King v. Gilbert.

[589]

(U. 2) Who must appear at it.

1. *FEMES* and *tenants in ancient demesne* are exempt from leets and tourns. Br. Exemption, pl. 13. cites the Register. 181.

2. In debt for an *amerciament* in a leet, the case was, that the *Abbot of A. was seised of the hundred of H. in Berks, and of a leet appendant thereto by prescription, to be held once a year, within a month of Easter.* The dissolution was found and that the towns of C. and N. with 24 others were within the hundred and leet, and that King Ed. 6. granted to one L. several lands in N. parcel of the possessions of the abbey and granted also *omnes curias, letas &c. & amerciamenta præmissis* in

in *N. pertinen. provenien. &c.* and that the said L. and his heirs, should have tot. talia & consimilia curias, letas &c. *amerciamenta & hereditamenta* as the abbot had infra the said lands &c. and afterwards King Ed. 6. granted the hundred and the leet to one O. which by several mesne conveyances came to the Lord Norris, the now plaintiff, and that B. the defendant claimed under L. and that he was an inhabitant in N. and being summoned to be at the leet, he made default and was amerced to 40s. for which the action was brought; adjudged, that L. had no leet nor amercement by this grant, neither was he discharged from the general leet of the hundred, because the leet mentioned in this grant is restrained to the land granted; for it is præmissis in *N. pertinen. & provenien.*, and there was no such leet there before the grant; for the leet which the abbot had, and which came to the king upon the dissolution was appendant to the hundred and did not belong to the lands granted to L. and as to the 2d clause L. could not have the like leet as the abbot had, for when eadem may be had and the party has words to have eadem, he shall never have *consimilia*: for eadem remains in the king, and if the king has a leet no man can have a leet in the same place, because 2 leets cannot be in one place insimul, and as for the word *amerciamenta*, it cannot properly be said *provenien. de præmissis*, because they do not issue out of land but by reason of an offence in another place where the leet is held, and the *amerciamenta* in the grant to L. are restrained infra terras in the grant, and the abbot had no leet infra the lands granted to L. but infra that and other lands intirely. Mo. 426. pl. 595. Hill. 28 Eliz. B. R. Lord Norris v. Barrett.

3. *Ecclesiastical persons* are exempted by the Statute of Marlebridge cap. 1c. 52 H. 3. from appearing at the sheriff's tourns, and consequently at leets which are derived out of the tourns. And if they should be distrained for any *amercement &c.* for not appearing in the leet, they have a writ upon the statute by way of privilege. Arg. 8 Mod. 297. Trin. 10 Geo. 1. in the Exchequer in Morgan's Case.

4. Persons exempted by the common law, are such as *infants under 12 and women &c.* per Cur. 8 Mod. 300. Trin. 10 Geo. 1. in the Exchequer in Morgan's Case.

(X) The Jurisdiction [of the Leet.]

[590

[1. **VIDE** the Statute of 18 Ed. 8. which shews of what things a leet hath conuſance.]

[2. They have power to hold plea of all *treasons and felonies*, besides the *death of a man*, and *rape of a woman*. * 7 H. 6. 22. b. † 9 H. 6. 44. b.]

* Br. Leet pl. 14. cites S. C. & S. P. by Cottelmore.

Fitzh. Leet pl. 10. cites S. C. & S. P. of petty treason and felony, but not of rape, or the death of a man.

† Br.

+ Br. Lect pl. 2. cites S. C. & S. P. Br. Lect pl. 26 cites 22 E. 4. 22. S. P. as to the enquiring of all felonies at common law, because they are the King's Courts. — Rape is not now enquirable in the leet, for though it was felony at the common law, yet the nature of the offence being charged to be no felony by W. 1. cap. 1. when another act made it felony again, yet could not the leet enquire thereof as a felony. 2 Inst. 81.

Br. Lect, [3. They have power to enquire of *treason*, as of the forging
pl. 2. cites *of false money*. 9 H. 6. 44. b.]
S. C. & S. P. per Babington, Ch. J.

* Br. Lect, [4. So they may enquire of *high-treason* done to the king
pl. 2. cites himself. 9 H. 6. 44. b. quære + 10 H. 6. 7.]
S. C.
+ Fitzh.

Ley pl. 5. cites S. C. of Treason. — Br. Ley-gager pl. 99. cites S. C. of Treason [but as mention of the word (high)] and Brooke says it seems, that of petty treason he may inquire but not of high treason.

Fitzh. Ley. [5. They have power to enquire of *felony*. 10 H. 6. 7.]
pl. 5. cites
S. C. — Br. Ley-gager, pl. 99. cites S. C.

S. C. at tit. [6. A man cannot be amerced in a leet for *surcharging a*
Nuisance *common*, for that this concerns a private interest, and not
(Q) pl. 7. the publick; for *this Court is for royal justice, and not for*
— Br. *private matters*. M. 12 Ja. B. between Bere and Stoner,
Lect pl. 30. *adjudged*.]
Brooke makes a

quære of
presentment of oppression of common, for it is very usual in leets, which may be by custom, and
nuisance is not such as may have an action, but that which is such to a great number of people,
as stopping of a way or not repairing of a bridge &c.

As in *hed-* [7. They may enquire of *common nuisances* done to the
ges, ditches *common people*. 9 H. 6. 45.]
and the
like, and in

the waste places though the lord has no land in the same vill. Br. Lect pl. 2. cites S. C.
— Br. Lect pl. 26. cites 22 E. 4. 22. S. P. as to all common nuisances as *bloodshed*,
washing or clipping of gold or silver, [but Brooke says quære inde] * *night-walkers* and the
like but not of close broken, because this is particular, but ditch not scoured or *bridge*
broken, shall be inquired a nuisance. — So of *robbery* which is a common nuisance.
Mich. 22 E. 4. b. pl. 2. — The steward of the leet cannot take an indictment of a robbery
done out of his precinct, nor of the death of a man; for this belongs not to the leet; and
if he does the lord shall be punished for contempt. Br. Lect pl. 18. cites 41 Aff. 30. —
And Ibid. pl. 31. cites S. C. that process was made against the lord to fine him and his
steward, because the steward took an indictment in the leet of a robbery done at D. whereas
there is no such vill in that county, and also for taking an indictment of the death of a man,
[591] which do not appertain to the leet and so he encroached upon the king, and there-
fore the justices of B. R. would not arraign the party on this indictment, and the
lord was fined 40s.

* Poph. 208. Hill 2 Car. B. R. Wheelhorfe's Case, S. P.

Fitzh. Ley. [8. They have power to enquire of all manner of *affrays*
pl. 5. cites *and assaults*. 10 H. 6. 7.]
S. C. & S. P. by Newton:

— Br. Ley-gager. pl. 99. cites S. C. & S. P. accordingly, quod fuit concessum. — An
indictment of assault and battery found in a leet without any blood spilt is not good. D. 533.
b. 334. a. pl. 14 Mich. 6 & 7 Eliz. 3. cites 13 E. 4. 10.

[9. They

[9. They have consuance of *bread and beer*. 18 H. 6. Fitzh. 13. b1.] Fitzh. Leet. pl. 1. cites S. C. & S. P. per tot. Cur.

[10. If a man, by reason of a tenure, ought to *cleans* a ditch next the high streets, and does [not] cleans it, by which the street is surrounded, so that the people cannot pass; he may be amerced in the leet for it, and may be awarded to be * *distrainted* to cleans it. † 29 E. 3. 29. Curia.] * This point is at Pasch. 29 E. 3. 28. a. the first plea and no such point at 29. and

so seems to be misprinted. † A distress is incident to a Court Leet of common right. Brownl. 36. Anon. — Amercement in a Court Leet for not scouring a ditch in a highway, and good, and resolved the party may be punished in the leet, and also by the Statute 18 Eliz. 1. for diverse causes. Raym. 250. Hill. 30 & 31 Car. 2. C. B. Stephens v. Haynes.

[11. If one receives a poor man to be his tenant in a town, who is chargeable to the town, and this against a bye-law made by the town, the town having power to make such bye-laws, this is punishable in the leet. P. 8. Ja. in Camera Scaccarii per Curiam.] Fol. 54^a. Lane 55, 56. Trin. 7 Jac. S. P. and seems

to be S. C. by custom such a bye-law is good; but by Snig and Altham clearly, the steward cannot amerce one for such a cause without an order [or bye-law] with a pain made before.

[12. An order with a pain may be made by the steward of a leet in a leet, that none shall receive such tenants as shall be chargeable to the parish. P. 8 Ja.] A bye-law imposing a penalty of 5l. per month on

every one within a leet that shall take or place any inmate within any house there, without giving security to the overseers of the parish, to discharge the parish; per Hale is a good bye-law and frequent in leets. Hard. 471. Trin. 19 Car. 2. in Scacc. Anon. — This bye-law was made at a Court Leet, held pro rege within his honour of Grafton, and this fine was estreated into the Exchequer, and process issued to levy it. Hale Ch. B. said it was hard to estreat the fine hither without taking the usual remedy for it by distress; and to extend the party's lands upon it, when perhaps he may have something to plead to it; as that he is not within the leet, or that he received no inmate; but the officers of the Court said, it was usual to estreat such fines into the Exchequer when they belonged to the king; otherwise when they belong to subjects. And thereupon the party was put to plead. Hard. 471. pl. 6.

13. A presentment was in a leet, that J. N. had inclosed such certain lands, which ought to lie in common for the inhabitants of the vill, is a void presentment, though it is laid to be ad documentum inhabitantium; for this is a tort, but no nuisance; quod nota per judicium; for the several parties may in this case have their action. Br. Leet, pl. 30. cites 27 Aff. 6.

14. A leet has power to amerce a man for a nuisance, and also to award that the offender be distrainted to amend it; per Cur. Br. Leet, pl. 35. cites 29 E. 3. 28. and Fitzh. Avowry, 265. For an amercement in a leet or hundred, a man may Quod nota.

distrain the beasts of the offender in any place within the precinct of the leet or hundred. Br. Leet, pl. 28. cites 2 H. 4. 24. — A leet by prescription may distraint for an amercement, and the lord may sell the distress; because the king may do so, and the leet is the king's, though the lord has the profits; for all justice is in the king, and therefore

fore the courts and gaols in towns corporate are written by the king *curia nostra & gaola nostra in custodia vestra existent.* Br. Leet, pl. 34. cites 21 H. 7. 40. — Br. Prescription, pl. 40. cites S. C. — Nota pro lege, *if a penalty be set on a man in a leet to redress a nuisance by such a day sub pœna 10l. and after it is presented that he had not done it, and that he sha' forfeit the penalty, this is a good presentment, and the penalty shall not be otherwise assessed, and the lord shall have action of debt clearly, but he cannot distrain and make avowry, unless by prescription of usage to distrain and make avowry.* Br. Leet, pl. 37. cites 23 H. 8.

It belongs to the king by reason of the leet, per Thorp and Belknap. br. Leet, pl. 5. cites S. C.

15. Lord of a hundred cannot by reason of the hundred have waif; for he cannot try it by jury; for he cannot compel the suitors to be sworn; *contra in a leet*; therefore waif belongs to it, and the day of the leet is the king's, and the lord it only his minister for the time. Br. Court Baron, pl. 2. cites 44 E. 3. 19.

— Br. Erray, pl. 2. cites S. C.

Fitzh. Fraunchise, pl. 2. cites S. C.

16. The bailiffs of St. Alban's by certiorari in banco removed three prisoners into B. R. whereof the one was indicted in another county, and therefore was sent to the Marshalsea, and the others were sent back, because nothing was against them in banco, nor were they indicted, and leet may inquire of felony, but if suspected persons are taken and not indicted, they cannot deliver them, but they shall be delivered before justices of deliverance by proclamation, and though the leet may enquire of felons, yet they cannot arraign them. Br. Corone, pl. 23. cites 8 H. 4. 18.

17. Leet may inquire of corrupt victuals. Br. Leet, pl. 1. cites 9 H. 6. 53.

Br. Leet, pl. 96. cites S. C. & S. P.

18. Indictment taken in a leet is as well as in B. R. of things touching the jurisdiction of the leet, and it may commit a man to prison, and assess a fine, *quod concessum fuit, quod nota.* Br. Ley Gager, pl. 99. cites 10 H. 6. 7.

Br. Leet, pl. 26. cites S. C. & S. P.

— Fitzh.

Tourn of Sheriff,

pl. 5. cites S. C. & S. P.

clearly by the opinion of the whole Court. — Jenk. 121. pl. 43. and 139. pl. 85, S. P. unless the statute which creates the offence, gives them power. — Br. Indictment, pl. 28. cites 6 H. 7. 4. S. P. — Br. Leet, pl. 22. cites S. C. & S. P. and that the law is the same of labourers and artificers.

19. Nota that things given by Statute as rape, putting out eyes, cutting out of tongues and the like, which are made felony by statute, those shall not be inquired in the leet, nor any others but those which are felony at the common law, and the others are void presentments; for coram non iudice. Br. Presentments in Courts, pl. 21. cites 22 E. 4. 22.

Br. Prescription, pl. 40. cites S. C.

20. A leet may make bye-laws to bind themselves. Br. Leet, pl. 34. cites 21 H. 7. 40.

21. It was adjudged, that *pound-breach* is not inquirable in a leet, because it is not a common nuisance. But Rhodes said, that *excessive toll* is inquirable there. 4 Le. 12. pl. 46. Patch. 27 Eliz. C. B. Sanderson's Case.

22. Court Leet cannot amerce for *leaving his gates open*, ad nocumentum inhabitantium. Mo. 356. pl. 484. Trin. 36 Eliz. *Evington v. Brimston.*

23. In replevin the defendant made conusance as bailiff to G. for that he had a leet within his manor of D. and that the plaintiff was amerced at such a Court, for putting his geese upon the common there, and for that amercement he distrained; but the Court held, that this was not an article inquirable in a leet, or punishable there, and therefore the plaintiff had judgment. Cro. Eliz. 448. pl. 14. Mich. 37 & 38 Eliz. C. B. Wormleighton v. Burton.

24. If a man be hindered to go, in a common highway, or if a ditch be made athwart that way so as he cannot go, it is presentable in this Court. Co. Litt. 56. a. [593]

25. In ancient times the king's Courts, and especially the leets, had power to inquire of, and punish fornication and adultery by the name of Letherwite. 2 Inst. 488.

26. Jurors in leets may inquire of inmates by 31 Eliz. cap. 7. par. 3. 2 Inst. 738.

27. Leet and toun cannot inquire of private trespasses. Jenk. 138. pl. 85. As a private assault which is no

terror to the people. 1 Hawk. Pl. C. cap. 63. l. 1.

28. A railer and fower of discord amongst neighbours is presentable in a leet. Hob. 246, 247, pl. 313. Mich. 16 Jac. Smith v. Pannel, See tit. Prohibition (F) pl 45. S. C. and the notes there.

29. Debt was brought for 40s. imposed on the defendant at a Court Leet of the plaintiffs for a contempt committed there; which was, that he put on his hat in the Court, and being admonished by the steward for so doing, he replied, viz. I do not value what you do. It was adjudged for the plaintiff. Raym. 68. Hill, 14 & 15 Car. 2. B. R. Bathurst v. Cox.

30. The bailiff of Westminster had levied money upon several persons upon presentments in the leet there for using trades not having been apprentices; and upon complaint made of this against B. it was agreed, per Cur. that the Statute 5 Eliz. does not give the leet any power to proceed thereupon, and directed that those aliens that so use trades not having been apprentices shall be presented at the sessions or in B. R. Sid. 289. pl. 4. Trin. 18 Car. 2. B. R. Amy v. Bennet. Raym. 154. Anon. S. C. says, that B. the defendant bailiff of this liberty would have levied 40s. a month upon them and upon their removing the

presentments by certiorari, it was debated if the leet had conusance of such things by the last clause in Statute 31 Eliz. cap. 5. and it seems not, because the offences there mentioned, and the Courts shall be expounded reddendo singula singulis.

31. The defendant was presented at a leet, for digging coney-burrows, and breaking the soil in the lord's waste; it was moved to quash it, because it is not ad commune nocumentum. Keeling Ch. J. said, that a leet cannot amerce for any thing done to the damage of the lord; and the presentment The leet can only amerce for a public nuisance not for a private

one, or
for parti-
cular da-
mage to
the lord, which though it may be presented for the information of the lord, yet the Court cannot punish the offender. 1 Saund. 135. Hilh 19 & 20 Car. 2. in Case of the King v. Dickenson.

One cannot be amerced in a leet for a *private nuisance*, but may for a publick; per Cur, 12 Mod. 598. Mich. 13 W. 3. Gwin v. Thornborough.

2 Keb. 367.
pl. 22. S. C.
adjudged ac-
cordingly.

32. By two justices Court Leet may, by custom, *make bye-laws* touching common though not originally; but per Tirrel J. leets have to do only with the peace, and if a leet may make a bye-law as to common, then the leet may make one bye-law and the Court baron another, and it cannot be known which is to be obeyed, and as to the cases put on the other side, they must be understood where a Court Leet and Court Baron are held together. But per Wild and Archer justices against Tyrrel judgment was given that the bye-law was good. Cart. 179. Hilh. 18 & 19 Car. 2. C. B. The Earl of Exeter v. Smith.

[594] 33. In trespass for breaking his house and taking away silver cup, the defendant *justified for a fine of 5l. imposed by the steward of the leet for contemptuous words spoken to the steward in the Court Leet*, ipso tunc judicialiter sedente, (viz.) that the house in which the Court was held, was the house of the Mayor of Sudbury, and that John Skinner, who, then and there being present, has more right to be there than the steward, and if he was Mayor of Sudbury he could not suffer the Court to be held there. The plaintiff replied, that the said house was the town-hall of that borough, and that Skinner was then mayor of the said borough, and the plaintiff a free burgess thereof, and that he quietly & pacifice spoke the words. Upon a demurrer the plaintiff had judgment, per tot. Cur. For no such fine ought to be imposed for the said words. 2 Jo. 229. Mich. 34 Car. 2. B. R. Ber- rington v. Brooks.

34. Leet cannot amerce for a private nuisance, but may for a publick. Per Cur. 12 Mod. 598. Mich. 13 W. 3. Gwin v. Thornborough.

(Y) Collateral Authority of the Leet.

Br. Leet,
pl. 14. cites
S. C. & S. P.
by Newton
J.

Ibid. pl. 24.
pl. 20. cites 3

[1.] If a man be riding there, where a leet is, the steward, for want of others, may compel him to be sworn. 1 H. 6. 13.]

2 H. 7. 15. S. P. by Fineux. — He may swear a stranger there. Br. Leet, pl. 20. cites 3 H. 7. 4. Fairfax J. For it is for the king's advantage.

Br. Leet,
pl. 14. cites
S. C. —

[2.] If the bailiff of the Court, or other officer, will not make a panel to enquire &c. upon the command of the steward,

Steward, or will not perform his duty, he may be fined. 7 H. Br. Debt, 6. 12. b.] pl. 85. cites S. C. and

that the lord brought action of debt, and the defendant demurred. Quære. — 8 Rep. 38. b. S. C. cited per Cur. and affirmed. — See tit. Amercement (U) pl. 1. S. C. and (Y) pl. 2. S. C. and the notes there.

[3, So he *may be commanded to do it upon a pain*, and if he does not do it, he shall lose the pain. 7 H. 6. 12. b.] See pl. 2. and the notes.

[4. If the *petit 12 make a false presentment*, and this is found false by the grand inquest, yet the *petit 12 shall not be amerced.* 9 H. 6. 44. b.] Br. Custom, pl. 3. cites S. C. and such a custom to

amerce them being alledged, the whole Court held it no custom but extortion; for the verdict of one 12 is intended in law to be as good as the verdict of another 12, but had the custom been of concealments it had been good. — Fitzh. Custom, pl. 1. S. C. and such custom is against common right, but it is usual to amerce them if they conceal any thing which they ought to present, and this may lie in custom,

[5. If a man be *amerced in a leet*, he ought to be amerced to a certain sum, as 10s. 20s. or other certain sum, and ought not to be amerced in general, and after *affiered to a certain sum*; for the *amercement ought to be certain*, and it ought *after to be affiered and mitigated by others.* Hobart's of Reports 173. between *Wilton and Hardingham.*] Hob. 129. pl. 166. Pasch. 14 Jac. S. C. — An amerement [595] in a Court Leet for an

offence presented need not be affiered, and Hob. 129. was denied by Holt Ch. J. Show. 62. Mich. 1 W. & M. in Case of *Matthew v. Cary.* — See tit. Amercement. (E) and (G).

6. A steward in a leet may *assess a fine on a tithingman who will not present*, and if the lord brings debt thereof the defendant cannot wage his law; because the leet is a Court of record. Br. Leet pl. 36. cites 10 H. 6. 7. Br. Leygager pl. 99. cites S. C. accordingly. — S. C. cited and

agreed per tot. Cur. 8 Rep. 38. b.

7. A common person who has a leet may *sell the distress* as the king may; for the Court is the king's though a common person has it. B. Leet pl. 20. cites 3 H. 7. 4. by Fairfax J.

8. If any *contempt or disturbance to the Court be committed in any Court of record*, the judges may impose a reasonable fine on the offenders, and a *leet is a Court of record*, and the *steward is judge there*, and therefore may impose a reasonable fine on any such offenders for an offence done to the Court before him. As if the bailiff of a leet refuses to execute his office the steward shall impose a reasonable fine upon him. Resolved per tot. Cur. 8 Rep. 38. b. Trin. 30 Eliz. C. B. Grisley's Case.

9. If any *misbehaves himself in the leet in any outrageous manner*, the steward may commit him, per Popham Ch. J. Ow. 117. Pasch. 37 Eliz. in Case of the Earl of Lincoln v. Fisher.

Cro. E. 881. 10. The defendant gave the plaintiff's steward the lie openly
 pl. 4. S. C. in the leet, for which the steward set a fine of 20s. upon him.
 and all the The plaintiff brought debt for the fine; all the justices agreed
 Court held, upon debate between them, the action was maintainable,
 that for because they are words of contempt in a Court of justice
 such fines, to a judge, for which the judge might fine him. Mo.
 ass. by 470. pl. 470. Mich, 39 & 40 Eliz, Lincoln (Earl of) v.
 the steward debtilies without a Fisher.

alleged to assess such fines, or to have such an action. Wherefore it was adjudged for the plaintiff. —
 Ow. 113. S. C. Gawdy at first held that the action would not lie; but afterwards changed his
 opinion, and the plaintiff had judgment to recover.

Br. Leet, 11. The steward in the leet may take recognizances for keep-
 pl. 39. cites ing the peace. 4 Inst. 263, 264. cap. 54.
 F. N. B. 82.

12. If a juror sworn to inquire for the king be arrested,
 by which the king's Court is disturbed, and the arrest
 made by an officer of B. R. upon affidavit thereof B. R.
 will grant an attachment, but denied it against such arrest
 made by officers of the marches of Wales. But they advised
 to file an information against the officer, for this disturbance to
 the leet, Lat. 198. Trin. 3 Car. Anon,

[596] (Y. 2). Where the Court is not held, what is
 to be done,

1. THE portreeve of Yeovil in the county of Somerset
 was usually elected to continue in his office for a year, and
 at the end of the year a new one to be chosen and sworn in the
 leet by the steward of Sir Edward Phillips, lord of the
 manor, which on some discord with Sir Edward was refused
 to be done, and thereupon process was awarded out of B. R.
 commanding the oath to be tendered to the portreeve; for B. R.
 is the supreme Court which ought to do justice to all the
 king's subjects, 2 Roll. Rep. 82. Pasch, 17 Jac. B. R. the
 Portreeve of Yeovill's Case.

(Y. 3) Presentments.
 How they must be,

1. PRESENTMENTS in leets ought to be certain, and shew
 at what place the nuisance was made, and to say *infra*
jurisdictionem bujus curie; for it is the declaration of the King,
 which ought to be good to every common intent, as it is
 said elsewhere; and if it be a nuisance to other land they
 ought to say certainly where the nuisance is &c. and where
 the land lies, to which the nuisance is done. Br. Leet,
 pl. 33. cites 5 H. 7. 3.

2. In

2. In every presentment of a *nuisance* in a Court Leet it must be mentioned to be *ad nocumentum ligeorum domini regis*; and the averring in action of debt brought for the pain assessed, that it was *ad commune nocumentum* is not sufficient; for it must be in the presentment which is the charge, and the omitting it is a fault incurable. Cro. J. 382. pl. 10. Mich. 13 Jac. B. R. in Case of Prat v. Stearn.

3. Juratores pro domino rege & domino menerii & tenentibus presented the defendant for *erecting a glass-house &c. ad magnum nocumentum*; it was quashed; for though it is good for the king and the lord of the manor leets being granted to the lords as derived out of the torn, and as for tenentibus, it is only surplussage, yet this presentment is ill, because it is not said *ad commune nocumentum*. 1 Vent. 26. Pasch. 21 Car. 2. B. R. Anon.

7. The defendant was presented and fined in a leet for refusing the office of a constable; it was moved to quash it, because it *expressed the Court to be held infra unum mensem sancti Michaelis, viz. 12 November*, which is above a month after Michaelmas, and it is necessary to set down the precise day, for it may else be on a Sunday, and yet within a month after Michaelmas, and for this cause it was quashed. Vent. 107. Hill. 22 & 23 Car. 2. B. R. Dacon's Case.

s Saund.
293. Da-
kin's Case.
S. C. the
present-
ment was
quashed per
tot. Cur.
—2 Keb.
731. pl. 18.
the King v.
Dakin S. C.

and for that reason the presentment was quashed; and the presentment was also tent. 18. Nov. per adjournamentum prædictum, whereas no adjournment was mentioned before to be entered, and this was also held ill.

(Y. 4) Presentments in Leets, and things done [597] there.

Pleadings in General.

1. **NOTA**, that presentments in leets, *which touch frank-tenement, or bind the franchise, shall be traversable*; but contrary of other presentments in leets. Br. Leet, pl. 27. cites 45 E. 3. 8.

2. Trespass upon the case, the plaintiff prescribed to have leet in D. with all the profits thereof, and that the defendant had disturbed the steward of the plaintiff to hold leet there &c. and the defendant said, that the plaintiff had leet there semel in anno, scil. such a day after Easter, and that the defendant has leet there semel in anno, that is to say, such a day after Michaelmas, and that the plaintiff gave warning to the defendant 15 days before the leet, and that his bailiff should be with him if he would, and that he should have the moiety of the profits of the leet of the plaintiff, and if he held his leet in other manner, that the defendant had used to disturb &c. and that the plaintiff did not give warning by 15 days, by which he disturbed him to hold the leet, prout ei bene licuit. Per Priot the defendant ought to traverse absque hoo,

hoc, that he and his predecessors ought to have the entire profits prout, and by him the plaintiff may maintain, that he and his predecessors have had leet by reasonable warning of three or four days, absque hoc, that it has been usual to warn by 15 days prout &c. by which Laicon said as above; absque hoc, that the plaintiff has had the entire profits of the leet, and absque hoc, that he has used to hold the leet without special warning in the manner as wealledge. Choke said, the warning is not alleged by us. Moyle said, therefore it seems that the second traverse is void, et adjournatur. Br. Traverse per &c. pl. 158. cites 38 H. 6. 16.

3. *If plea be removed into B. R. of which they cannot hold plea as formodon &c. yet there they shall hold plea therein, as the Court where it ought to be brought should do, and shall make process per grand cape & petit cape, and otherwise, as the first Court ought to do. And so if a thing before justices of peace be removed before them. Per Fineux Ch. J. Br. Jurisdiction, pl. 46. cites 14 H. 7. 14.*

Br. Travers
per &c.
pl. 183.
cites S. C.
— Br.
Presentment
pl. 15. cites
S. C. —
D. 13. b.
pl. 64. Trin.

4. *A presentment in the leet or tourn, after the day of the presentment, binds the party for ever, and is not traversable but in Cases that touch one's freehold, as that one ought to cleanse the highway &c. ratione tenuræ suæ; therefore the course is to remove such presentments into the King's Bench by a certiorari, where he may traverse them. Finch's Law 386. 8vo. cites 5 H. 7. 3.*

28 H. 8. S. P. by Shelly, quod Baldwin concessit. But Fitzherbert said, that Britton, who is good authority, says, that every presentment is traversable which is presented in a leet, and also in the tourn of the sheriff, out of which leets were originally derived &c. — S. C. as to Fitzherbert's opinion cited Arg. 3 Mod. 138. — All presentments may be traversed either by removing them into B. R. or in an action. In trespass against the bailiff you cannot traverse a presentment, but in a replevin it may be done, and it will not be sufficient to say, quod presentat. suit, but the fact must be set forth, and this action is to try the right, but the other only to recover damages. Trin. 5 Ann. in Case of Brook v. Hustler. — 1 Salk. 56. S. C. but S. P. does not appear. — 11 Mod. 76. S. C. but S. P. does not appear.

[598] 5. *A release of all demands doth not discharge a man of his suit to a leet by reason of his residency, because a leet is the king's Court to which every liege subject is to come and perform his allegiance to him. And also because suit of Court is inseparably incident to a Court Leet, which cannot be released. Brownl. 186. Trin. 4 Jac. in Case of Tott v. Ingram.*

6. *In pleading the holding a Court, it must say the place where was part of the manor, or holden of it at least. Hob. 56. Trin. 13 Jac. in Case of Foster v. Jackson.*

12 Mod. 4.
Palch. 3
W. & M.
the S. C.
it had been
a good
objection
the not

7. *Upon a certiorari to remove a presentment at a leet for a nuisance; exception was taken, that the leet not being of common right, but taken out of the tourn, and the tourn is of common right, therefore because it is not shown how, nor by what right this Court was held, whether by patent or prescription, it is not good; but the Court said, the precedents were all so, and*

and over-ruled the exception. 1 Salk. 200. pl. 2. The King ^{shewing Authority, if constant} against Gilbert.

practice had not been otherwise.

8. In debt for an amercement in a Court for not doing suit, an exception was taken that the *Court being uncertain* when it will be held, (that is where the lord may hold it when he pleases,) a *particular and convenient notice* ought to be given, when and where the Court is to be held, and cited 32 or 22 E. 4. 27. b. 28. a. 3 Cro. 353. 555, 556. and that a general notice *in the church* is not notice *to incur a forfeiture*, unless a particular custom for it. It was answered that, it is found that due notice was given, and this the judge of assize is supposed upon the evidence to direct the jury. But Holt Ch. J. said, we cannot judge of the notice, because you ought to have *shewed particularly*, that he was summoned to the Court at such *day and place* to be held. Per Powell, J. to take advantage of a forfeiture notice should be *personal, unless a particular custom to the contrary*. In *ancient leets*, personal notice perhaps is not necessary; but notice in church and market may be well. But otherwise where it is *not an ancient leet*. Adjournatur. 11 Mod. 76. Brook v. Hustler.

See more as to the Jurisdiction &c. of Court Leets.—Kitch. 16. &c.—4 Inst. 261. cap. 54.—Prynne's Animadv. on 4 Inst. 189. 180.—See Tit. *Amercement*.

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